Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

CARPENTER TECHNOLOGY CORPORATION,

Petitioner,

v.

AGERE SYSTEMS, INC., CYTEC INDUSTRIES, INC., FORD MOTOR COMPANY, SPS TECHNOLOGIES, LLC AND TI AUTOMOTIVE SYSTEMS LLC,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. *United States v. Atlantic Research Corp.* resolved decades of conflicting lower court decisions, and held that a party does not "incur" its own response costs for purposes of § 107(a) of CERCLA when it pays to satisfy a settlement agreement. Did the Third Circuit contradict *Atlantic Research* and CERCLA when it held that a party "incurs" its own response costs when its payments to satisfy a settlement agreement are placed into a common account used to fund an ongoing CERCLA cleanup?

2. The courts of appeals must enter judgment for the defendant, and "cannot remand," when a plaintiff fails to meet its burden of proof at trial. Did the Third Circuit ignore established precedent fundamental to the adversarial process when, sua sponte, it remanded to the district court to allow plaintiffs that failed to meet their burden of proof under § 113(f) of CERCLA to reopen the record and relitigate their case?

CORPORATE DISCLOSURE STATEMENT

Petitioner Carpenter Technology Corporation does not have a parent corporation, and no publicly-held company owns 10% or more of its stock.

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Carpenter Technology Corporation respectfully prays that the United States Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 602 F.3d 204 (3d Cir. 2010) and is reprinted in the Appendix at 1a. The opinion of the district court was not published and is reprinted in the Appendix at 68a.

JURISDICTION

The court of appeals entered judgment on April 12, 2010 and denied Carpenter's timely petition for rehearing en banc or panel rehearing on May 25, 2010. Respondents similarly filed a timely petition for panel rehearing, also denied on May 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 104, 107, 113 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9604, 9607, 9613, 9622, and 28 U.S.C. § 2106, are set forth in the Appendix at 165a.

STATEMENT OF THE CASE

Since 1986, there have been over 25 appellate court decisions and over 100 district court decisions addressing one central issue under CERCLA: whether a party that is itself liable under CERCLA has a cause of action to recover response costs from

other liable parties, and if so, whether its claim is for complete cost recovery under § 107(a), 42 U.S.C. § 9607(a), or contribution under § 113(f), 42 U.S.C. § 9613(f). These lower court decisions were contradictory, and often failed to advance CERCLA's primary purpose of promoting prompt, voluntary cleanups of contaminated sites.

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) and *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007), the Court resolved this decades-long dispute with certainty and clarity. In *Aviall*, the Court held that a PRP[1] can bring a contribution action under § 113(f)(1) only if it has first been sued under § 106 or § 107. 543 U.S. at 160-61. In *Atlantic Research*, the Court held that a PRP can bring a cost recovery action under § 107(a), but "only [for] the costs it has 'incurred' in cleaning up a site," not when it "pays to satisfy a settlement agreement or a court judgment." 551 U.S. at 139 (quoting 42 U.S.C. § 9607(a)(4)(B)).

The decision below undermines the Court's resolution of this critical issue and will return private parties and the United States back to years of additional litigation over what should be settled law. Specifically, the Third Circuit has created a new rule whereby any PRP that settles by making payment to another PRP toward an ongoing cleanup at a CERCLA site can bring a § 107(a) claim for joint and several liability to recover 100% of its costs.

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[1] A "PRP" is a potentially responsible party, that is, a party that may be liable under CERCLA. *Aviall*, 543 U.S. at 161.

This new "payment rule" warrants the Court's immediate review for four reasons. First, it conflicts with how *Atlantic Research* defined "incurred" under § 107(a) of CERCLA. Second, it is inconsistent with the settlement provisions of CERCLA, which prohibit a non-signatory to a consent decree from performing the required cleanup, that is, from "incurring" its own response costs. Third, it has the potential to undermine CERCLA's goal of promoting prompt, voluntary cleanups of contaminated sites, by providing PRPs with an incentive not to settle with EPA: under the Third Circuit's "payment rule," PRPs that settle with private parties receive more generous cost-recovery claims (claims for joint and several liability under § 107(a)) than those that do settle with EPA (who are limited to more restrictive § 113(f) contribution claims). And finally, the ruling invites PRPs to structure private settlements to create § 107(a) claims when they otherwise would be limited to § 113(f) claims, or have no claims at all, thus undermining CERCLA's purpose of providing distinct claims to parties in "different procedural circumstances." *Atlantic Research*, 551 U.S. at 139 (internal quotation marks and citation omitted).

Also, this case presents important and recurring questions of appellate procedure regarding the circumstances under which a court of appeals may order a remand to reopen the record when a party fails to meet its burden of proof at trial. After concluding that certain plaintiffs failed to meet their burden of proof at trial, the Third Circuit, sua sponte, remanded to the district court with instructions permitting the district court to reopen the record to provide the plaintiffs with another,

unrequested opportunity to prove their case. By doing so, the Third Circuit violated established rules of appellate procedure fundamental to our adversarial process, which prohibit relitigating issues on remand and arguing issues never raised at trial or on appeal.

I. Factual Background

From 1972 through 1976, a waste disposal company used what became known as the Boarhead Farms Superfund Site in Pennsylvania (the "Site") as an illegal dumping ground for hazardous wastes generated by its customers. Carpenter was one of those customers, along with over 20 other entities, including several of the plaintiffs below. Following several years of investigation, EPA selected a remedy for the Site, which was to be implemented in two stages, or "operable units" ("OU-1" and "OU-2").

In June 2000, EPA commenced a civil action against Cytec, Ford and SPS under § 107(a) of CERCLA by simultaneously filing a complaint and consent decree, which required Cytec, Ford and SPS to complete the OU-1 remedial work (the "OU-1 Consent Decree"). Those parties subsequently settled with TI and Agere, who agreed to contribute funds to accounts established to perform the OU-1 remedial work.

In December 2001, EPA commenced another civil action under § 107(a) against Cytec, Ford, SPS and TI by filing a complaint and second consent decree, which required Cytec, Ford, SPS and TI to complete the OU-2 remedial work and to reimburse

EPA for approximately $7 million in past response costs related to the Site (the "OU-2 Consent Decree"). Those parties subsequently settled with Agere for approximately $1 million to reimburse the consent decree signatories for a portion of EPA's past response costs and to contribute to accounts established to perform the OU-1 and OU-2 remedial work. The signatories to the OU-2 Consent Decree then repaid Agere $400,000 for an assignment of Agere's claims.

II. Proceedings Below

In 2002, plaintiffs Agere, Cytec, Ford, SPS and TI asserted claims in a private CERCLA action against 23 defendants, including Carpenter, for cost recovery under § 107(a) and contribution under § 113(f).[2] The district court held that Cytec, Ford, SPS and TI (for the OU-2 costs) had both § 107(a) and § 113(f) claims against Carpenter, and that Agere and TI (solely for the OU-1 costs) had § 107(a) claims against Carpenter.

For purposes of the § 113(f) contribution claims, the district court concluded that the volume of waste that each PRP disposed at the Site would constitute the primary factor to guide its equitable allocation. At trial, the only evidence that plaintiffs introduced to establish the waste volumes for one of the defendants and three of the plaintiffs was a stipulation plaintiffs entered with that defendant,

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[2] The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

but not with Carpenter (the "June 23rd stipulation"). Carpenter specifically objected to the admission of the June 23rd stipulation as evidence against it. App. 52a. The district court entered judgment against Carpenter, and relying exclusively on the June 23rd stipulation as evidence of the waste volumes of those four PRPs, determined Carpenter's equitable share based on its share of the total volume of waste disposed of at the Site.

On appeal, the Third Circuit vacated the judgment and remanded for further proceedings. The Third Circuit held that Agere and TI (for the OU-1 costs) could assert cost recovery claims under § 107(a) for the amounts paid pursuant to their settlement agreements with the consent decree signatories. App. 41a. The court of appeals reasoned that TI and Agere "incurred" their own response costs within the meaning of *Atlantic Research* by putting "their money in the pot right along with the money from the signers of the consent decrees." App. 38a.

Consistent with *Atlantic Research*, the Third Circuit also held that Cytec, Ford, SPS and TI (for the OU-2 costs) were limited to contribution claims under § 113(f) for the costs they paid pursuant to the OU-1 and OU-2 Consent Decrees. App. 47a. The Third Circuit then held that these plaintiffs failed to meet their burden under § 113(f) to prove each party's "fair share" of liability at the Site because "the June 23rd stipulation should not have been admitted against Carpenter." App. 55a. The plaintiffs thus "did not rely on competent evidence as to four of the parties' waste volumes," and "without a

mention of any other evidence of the matters covered by the June 23rd stipulation, it was impossible for the District Court to perform an equitable allocation of waste volumes among Carpenter and the other PRPs." App. 55a-56a.

Despite its conclusion that the plaintiffs that were properly limited to § 113(f) claims failed to meet their burden of proof, the Third Circuit did not enter judgment for Carpenter. Instead, the Third Circuit, sua sponte, remanded these claims to the district court with instructions permitting the district court to reopen the record to allow plaintiffs to introduce additional evidence to try to satisfy their burden of proof. The Third Circuit did so even though plaintiffs relied exclusively on the June 23rd stipulation in the district court proceedings and throughout Carpenter's subsequent appeal, and even though plaintiffs never requested a remand, and Carpenter specifically requested judgment in its favor for plaintiffs' failure to satisfy their burden of proof.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision to Provide a § 107(a) Cost Recovery Claim to PRPs That Settle With Other PRPs Warrants Immediate Review.

The Third Circuit has created a new rule whereby any PRP not sued by the United States under § 106 or § 107 that pays toward an ongoing response action being performed by others has "incurred" costs for which it can seek complete cost

recovery under § 107(a) of CERCLA. The Court should review this "payment rule" because it conflicts with this Court's precedent and with the text and policies of CERCLA, and creates an incentive for parties that will produce undesirable consequences in future CERCLA actions.

A. The Third Circuit's "Payment Rule" Conflicts With *Atlantic Research*.

Section 107(a)(4)(B) of CERCLA provides a cause of action for the recovery of "costs of response incurred by any other person." 42 U.S.C. § 9607(a)(4)(B). In *Atlantic Research,* the Court defined what the term "incurred" means for purposes of § 107(a), drawing a clear distinction between costs of performance, on the one hand, and amounts paid in settlement, on the other. Thus, when a PRP actually performs a cleanup, and has not been sued by the United States in a § 106 or § 107 action, it "incurs" costs for which it can seek recovery under § 107(a). But when a PRP merely "pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response," and thus cannot recover under § 107(a). *Atlantic Research*, 551 U.S. at 139.[3]

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[3] The Court in *Atlantic Research* also held that "any other person" means any person other than the federal government, including PRPs, and that a PRP can maintain a cost recovery action under § 107(a) "only" to recover costs that the PRP "has 'incurred' in cleaning up a site." *Atlantic Research*, 551 U.S. at 135, 139 (quoting 42 U.S.C. § 9607(a)(4)(B)).

On its face, the ruling below conflicts with these principles. The Third Circuit held that Agere and TI (for the OU-1 costs) have § 107(a) claims to recover the amounts they contributed toward the cleanup of the Site, "*even though the payments were made pursuant to settlement agreements*" with the other plaintiffs. App. 41a (emphasis added). In reaching this conclusion, the Third Circuit created its own, new interpretation of the meaning of "incurred" under § 107(a), namely, to pay the bills "as a job gets done." App. 39a. Thus, the Third Circuit reasoned that Agere and TI "incurred" costs because they "put their money in the pot right along with the money from the signers of the consent decrees," and the costs sought were "payments made for on-going work." App. 38a-39a.

Under *Atlantic Research*, the proper distinction is performance (without first being sued by the United States under § 106 or § 107), not payment. Thus, if PRPs (like Agere and TI) settle with other PRPs and agree to pay into a common fund a portion of the costs for future response action, those PRPs do not "incur" their own costs under § 107(a). Rather, these payments – regardless of their ultimate use – are made "to satisfy a settlement agreement," and are therefore not recoverable under § 107(a). *Atlantic Research*, 551 U.S. at 139.

B. The Third Circuit's "Payment Rule" Conflicts With Sections 104 and 122 of CERCLA.

In addition to conflicting with *Atlantic Research*, the Third Circuit's § 107(a) ruling is

inconsistent with CERCLA's settlement provisions. Pursuant to Sections 104(a) and 122(a) of CERCLA, the President (and by delegation, EPA) is granted authority to enter into settlements with PRPs, culminating in either a consent decree or an administrative order. 42 U.S.C. §§ 9604(a), 9622(a). Under these settlements, EPA may authorize a PRP to perform a remedial action if EPA determines that the cleanup "will be done properly and promptly" by that PRP. *Id.*

Further, under § 122(e)(6) of CERCLA, a PRP can perform a remedial action at a federal Superfund site under investigation – and therefore "incur" its own response costs – only if authorized by EPA:

> When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, *no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.*

42 U.S.C. § 9622(e)(6) (emphasis added).

Thus, when, as here, a cleanup is governed by a consent decree, PRPs that are not parties to the consent decree, and have not been approved by EPA, have no right or ability to perform the cleanup under

CERCLA, and cannot "incur" their own response costs under § 107(a). Instead, they can merely settle with the consent decree signatories for a portion of the costs, past or future, that those other parties "incur."

C. The Third Circuit's "Payment Rule" Will Discourage Settlements With EPA and Frustrate CERCLA's Primary Goal of Prompt, Voluntary Cleanups.

The Third Circuit chose to depart from this Court's interpretation of § 107(a) in *Atlantic Research* because it was concerned that: (1) if non-settling PRPs did not have a § 107(a) claim, they would be left with no remedy, *see* App. 39a ("If we were to hold that Agere and TI cannot pursue § 107(a) claims for their settlement payments, they would be completely barred from recovering those amounts under CERCLA."); and (2) if non-settling PRPs had no remedy, CERCLA's goal of encouraging prompt cleanups would be thwarted. *See* App. 40a. ("When a company ... has not yet been sued by the EPA but appreciates that it bears some responsibility for cleaning up hazardous waste, the language of CERCLA, which is intended to encourage cleanup, ought not be interpreted to discourage participation in cleanup if a more consistent construction of the statute is plausible.").

But PRPs like Agere and TI are not without a remedy. Instead, they have a choice. They can settle with EPA, subject themselves to direct liability to EPA, and retain a contribution claim under § 113(f) against other non-settling PRPs for costs paid in

excess of their fair share. Or, if they elect not to settle with EPA, they can liquidate their liability for contribution to those PRPs that do settle with EPA and that do incur the response costs, but forego any claims against other responsible third parties to recover all or a portion of the amounts they paid in settlement.

And while the Third Circuit thought it necessary to provide PRPs like Agere and TI with a § 107(a) claim to encourage private party participation in site cleanups,[4] its holding actually creates a disincentive for PRPs to settle with EPA by committing to perform cleanups. Unquestionably, one of CERCLA's primary goals is to encourage PRPs to settle with EPA to perform voluntary cleanups, and CERCLA provides EPA with several tools to encourage prompt settlements with it.[5]

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[4] *See* App. 40a (stating that one of CERCLA's primary goals is "to encourage the timely cleanup of hazardous waste sites") (quoting *W.R. Grace & Co. v. Zotos Int'l, Inc.*, 559 F.3d 85, 88 (2d Cir.2009)) (internal quotation marks omitted).

[5] In support of this goal, CERCLA expressly encourages early settlements, *see, e.g.*, 42 U.S.C. § 9622(a) ("[T]he President shall act to facilitate agreements ... that are in the public interest ... in order to expedite effective remedial actions and minimize litigation."), and provides a number of incentives for PRPs to promptly settle their liability to EPA and undertake cleanup responsibility at a site. *See* 42 U.S.C. § 9622(f) (authorizing EPA to provide settling parties with a covenant not to sue), § 9613(f)(1) (providing settling parties with the right to seek contribution from non-settling PRPs), § 9613(f)(2) (protecting settling PRPs from contribution claims from other parties); *see also E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 536 (3d Cir. 2006) (noting that CERCLA's legislative history "reveals an express bent toward encouraging

Under the Third Circuit's ruling, however, a PRP that does not settle with EPA has a "substantially more generous" remedy under § 107(a) than a PRP that does settle with EPA, which is limited to claims for contribution under § 113(f). *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997). Section 107(a) has up to a six-year statute of limitations, 42 U.S.C. § 9613(g)(2); "allows for complete cost recovery under a joint and several liability scheme," App. 20a; and offers a relaxed burden of proof whereby a plaintiff need only prove that a defendant is liable under CERCLA, *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. __, 129 S. Ct. 1870, 1881 (2009). By contrast, § 113(f) has a three-year statute of limitations, 42 U.S.C. § 9613(g)(3); allows for recovery only of those amounts spent in excess of the plaintiff's own fair share of liability, *Atlantic* Research, 551 U.S. at 138-39; and requires a plaintiff to prove each party's equitable share of liability, including its own, App. 47a-48a, 55a.[6]

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settlement") (citations omitted), *vacated on other grounds by*, 551 U.S. 1129 (2007).

[6] As the decision below demonstrates, the differences between § 107(a) and § 113(f) claims can have case-dispositive impacts. Cytec, Ford, SPS and TI (for OU-2 costs) were sued under § 106 and § 107, and signed the consent decrees; therefore, they were properly limited to claims for contribution under § 113(f). It was thus their burden to prove each party's "fair share" of liability at the Site. App. 55a. They failed to do so, and the Third Circuit properly vacated the judgment previously entered in their favor. If those plaintiffs had § 107(a) claims for joint and several liability, they would not have been required to prove an equitable allocation.

Consequently, PRPs that otherwise would have settled with EPA and sought contribution from other PRPs under § 113(f) now have considerable incentive *not* to settle with EPA, and instead do what Agere and TI did: remain on the sidelines and hope other PRPs settle with EPA, privately agree to participate in the cleanup with those settling parties (without assuming any direct responsibility to EPA), and then seek complete cost recovery from other PRPs under § 107(a).

This disincentive to settle with EPA could have significant, practical ramifications for cleanups at federal Superfund sites. And EPA depends on voluntary settlements to implement CERCLA's fundamental purpose – to clean up contaminated sites. According to a July 2009 Report prepared for Congress by the United States Government Accountability Office, through fiscal year 2007, "EPA enforcement actions have resulted in an estimated $29.9 billion in cost recoveries, commitments to conduct site work, and other outcomes," and "[a]lmost 80 percent of EPA's completed actions at [National Priorities List] sites resulted in agreements with responsible parties to perform or pay for site cleanup work." U.S. GAO, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Funding Requirements*, GAO-09-656, at 6 (July 2009). When questioned about recent judicial decisions addressing the interaction between § 107(a) and § 113(f), EPA officials identified as their "key concern" whether such decisions would "maintain the benefits of settling with the government for responsible parties." *Id.* at 48-49.

Rather than maintain the benefits of a settlement with the government, the Third Circuit's ruling introduces an incentive for PRPs to eschew settlement with EPA in favor of creating the right to seek complete cost recovery under § 107(a)'s joint and several liability scheme. This is in direct conflict with CERCLA's policies of promoting early settlement and prompt cleanup, and warrants the Court's immediate review.

D. The Third Circuit's "Payment Rule" Invites Claim Manipulation.

Finally, the Third Circuit has created a cost recovery regime that has the potential to undermine this Court's CERCLA jurisprudence because it invites both plaintiff and defendant PRPs to structure private settlements to create § 107(a) claims, when they otherwise would be limited to § 113(f) claims, or have no claims at all. Two examples illustrate how PRPs can manufacture § 107(a) claims in this way.

First, a plaintiff PRP that has been sued by and has settled with EPA, and therefore would be limited to a claim for contribution under *Aviall*, could convert that claim to one for joint and several liability under § 107(a) by having another PRP (essentially a straw party) pay the bills "as [the] job gets done," App. 39a, and then purchasing the straw party's claim. Indeed, that is what the consent decree signatories did, in part, with Agere. After agreeing with the consent decree signatories to contribute almost $1 million toward the cleanup of the Site, Agere assigned its claims to them in

exchange for $400,000. App. 12a. As a result, when they signed the consent decrees with EPA, agreeing to perform the cleanup, the consent decree signatories had only a right to seek contribution under § 113(f) for costs that they incurred. But by the time of trial, they had received a net $600,000 payment from Agere, and under the Third Circuit's ruling, acquired a § 107(a) claim to recover Agere's $1 million "contribution" to the cleanup fund. The acquisition of a § 107(a) claim also shifted the burden of proof to the defendants and expanded the statute of limitations for plaintiffs' newly-created cost recovery claim.

Second, the Third Circuit's ruling creates the ability for still greater claim manipulation by PRP defendants because it allows a § 107(a) cost recovery claim as long as *any* portion of the private PRP settlement is designated to pay for "on-going" work.[7] Under the Third Circuit's "payment rule," any PRP defendant in litigation that enters into a private settlement could thus create a § 107(a) claim to recover 100% of its settlement payment simply by fashioning the settlement in such a way that some portion of the settlement is paid into a common fund used to defray ongoing cleanup work. It is not uncommon for CERCLA settlements to be structured

[7] Indeed, Agere's settlement, paid into the OU-2 fund, included a payment of $83,000 expressly for reimbursement of a portion of EPA's past costs. The Third Circuit acknowledged that this payment "could arguably be considered reimbursement rather than co-funding." App. 41a n. 32. Yet, the Third Circuit allowed Agere (or its assignee) to recover these costs in a § 107(a) cost recovery action because it was "content to give the benefit of the doubt to Agere." *Id.*

so that some portion of the settlement consists of a commitment to pay a percentage of future site work. The Third Circuit's holding would allow a defendant in a private party CERCLA action, which was subject to private-party, contribution litigation after refusing to settle with both EPA and the performing PRPs, to have a § 107(a) claim for its entire settlement, merely by agreeing in its settlement to pay a portion of future costs. And further claim manipulation is possible because a consent decree signatory could insist as part of its private settlement on an assignment of these newly-created § 107(a) claims.

After this Court carefully limited the universe of PRPs eligible to assert a § 107(a) cost recovery action to those that perform a cleanup without first being sued by the United States, the Third Circuit's "payment rule" would make a § 107(a) cost recovery action available to virtually all PRPs, as long as those PRPs pay anything at any time towards an ongoing CERCLA cleanup. The Third Circuit's "payment rule" thus has the potential to further complicate and prolong CERCLA cost-recovery litigation by converting settling defendants into parties with § 107(a) claims. This Court's intervention is warranted to prevent these results, and to clarify, consistent with *Atlantic Research* and CERCLA, that a PRP must actually perform its own cleanup, not merely pay for one being performed by another, to "incur" costs under § 107(a).

II. The Third Circuit's Order Remanding the Case With Instructions That Allow the District Court to Reopen the Record Conflicts With Established Law Regarding Both the Propriety of Remand and the Waiver of Issues on Appeal.

The Third Circuit found that four plaintiffs failed to satisfy their acknowledged burden of proof under § 113(f) of CERCLA during the bench trial in this case, yet nonetheless ordered a remand with instructions that allow the district court to reopen the record and give these plaintiffs a second opportunity to prove their case. It did so without citation to any unusual factual or legal circumstances, and without any request by the plaintiffs for remand. The Third Circuit's remand order, therefore, conflicts with well-established principles of appellate procedure governing the propriety of remand and the waiver of issues, and deprived Carpenter of fair notice of the grounds on which the court decided its appeal and a full and fair opportunity to brief and argue this potentially-dispositive issue. It also invites plaintiffs in future cases to seek remand orders and prolong litigation in an already overburdened federal judiciary. This Court should exercise its supervisory powers to correct the Third Circuit's unwarranted departure from the accepted and usual course of legal proceedings, and also to give guidance to the lower courts, which, as here, often honor the legal principles governing remand and wavier only in the breach.

A. This Court's Precedents Prohibit Remand to Reopen the Record When a Plaintiff Fails to Satisfy Its Burden of Proof.

Few rules are more fundamental to our adversarial system than the requirement that a party satisfy its burden of proof, or the necessary corollary that a failure to do so must result in a judgment for the opposing party. *See, e.g.*, 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 301.02 at n.8 (Matthew Bender ed. 2010) ("At trial the penalty for not producing evidence when obliged to do so is nonsuit, dismissal, or adverse finding, or when trial is by jury, directed verdict."). Permitting a litigant a second opportunity to prove its case, moreover, runs contrary to established principles that seek both to protect parties from the burden of re-litigating issues and to promote judicial economy. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (when a party had a "full and fair opportunity to litigate [its] claims," that party is not entitled to re-litigate the issue).

For these reasons, under the decisions of this Court and the courts of appeals, a plaintiff is not entitled to a remand to reopen the record following an appellate court's determination that the plaintiff failed to satisfy its burden of proof at trial, unless some "special circumstance" exists that would make entry of judgment for the defendant unfair. The Third Circuit simply disregarded this well-established rule of appellate procedure, as have other courts of appeals in a too-sizeable minority of cases.

The courts of appeals undoubtedly possess authority to direct entry of a judgment as a matter of law for a defendant when a trial verdict for the plaintiff has been set aside on appeal due to the insufficiency of the plaintiff's evidence. *Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000); *Neely v. Martin K. Eby Constr. Co., Inc.*, 386 U.S. 317, 326 (1967). Both this Court and the courts of appeals have identified several factors that govern the decision whether to direct entry of a judgment for the defendant, or to remand a case for further proceedings, following an appellate court's determination that the evidence was insufficient to support a judgment for a plaintiff. These decisions limit the circumstances in which a plaintiff that failed to satisfy its burden of proof at trial may obtain a remand to reopen the record only to those when entry of judgment for the defendant would be unfair for some reason outside the plaintiff's control. When such special circumstances do not exist, a remand to reopen the record is not appropriate.

For example, in *Weisgram*, this Court held that a court of appeals properly reversed a trial verdict and entered judgment as a matter of law for a defendant when, following the court of appeals' exclusion of expert testimony offered by the plaintiff, the evidence was insufficient to support the verdict. *Weisgram*, 528 U.S. at 455-56. There, the plaintiff was not entitled to a remand because he had notice throughout the proceedings that the defendant was challenging his expert, yet made no attempt to introduce additional evidence or offer grounds for a new trial. *Id.* Similarly, in *Neely*, the court of appeals concluded that the evidence was insufficient

to support a trial judgment for the plaintiff, and it directed entry of a judgment for the defendant. This Court affirmed because, in the proceedings before the court of appeals, the plaintiff "suggested no grounds for a new trial" or "that any other reason required a remand to the District Court." *Neely*, 386 U.S. at 329. The Third Circuit has also held that "remand should not be ordered when 'two bites of the apple' would be given to a litigant who . . . has neglected to produce evidence to support a desired finding and has, therefore, failed to carry its requisite burden as to a particular issue." *EEOC v. Westinghouse Elec. Corp.*, 925 F.2d 619, 631 (3d Cir. 1991). *See also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1063 (8th Cir. 2000) (Plaintiffs "had a full and fair opportunity to present their case, and the record evidence was insufficient to justify the verdict. [Defendant] is therefore entitled to judgment as a matter of law. . . .") (citing *Weisgram*, 528 U.S. at 444); *Mildred Cotler Trust v. United States*, 184 F.3d 168, 176 (2d Cir. 1999) (holding that a plaintiff that failed to satisfy its burden of proof at trial had "no right to a second opportunity on remand to try to prove" its case).

Conversely, an appellate court may remand to reopen the record to allow a plaintiff to supplement its case only when the plaintiff was prejudiced by some trial error, change in law, or intervening event. *See, e.g.*, *Neely*, 386 U.S. at 327 (suggesting that remand may be appropriate when the trial court "itself caused the insufficiency in plaintiff-appellee's case by erroneously placing too high a burden of proof on him at trial"); *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267-68 (1936) (remand

appropriate when intervening events require new proceedings in light of changed factual situation); *Romero v. Pomona*, 883 F.2d 1418, 1423 (9th Cir. 1989) ("change in law may warrant reopening a case," but not where the change "does not substantially affect the burden of proof and was reasonably anticipated by existing law"), *overruled on other grounds by Townsend v. Holman Consulting Co.*, 929 F.2d 1358 (9th Cir. 1991) (*en banc*).

The Third Circuit's determination to remand this case conflicts with *Weisgram* and *Neely* as well as with decisions in the Third Circuit and other courts of appeals. Throughout the proceedings in the lower courts, the plaintiffs asserted claims under § 113(f) and were aware that they may only have had claims under § 113(f), and not also have claims under § 107(a).[8] Plaintiffs also knew that they bore the burden of proof under § 113(f), that they relied exclusively on the June 23rd stipulation to establish the waste volume of four parties, and that Carpenter challenged the admissibility of the June 23rd stipulation, which the Third Circuit ultimately deemed inadmissible against Carpenter. App. 55a. But the plaintiffs nonetheless relied on no other admissible evidence of waste volume for these four parties to support their § 113(f) claims, or even any argument for a remand on appeal. The Third Circuit did not so much as discuss the law governing the propriety of remand or the facts that made this case

[8] Indeed, Carpenter opposed plaintiffs' claims under §107(a), and maintained throughout the trial court proceedings that plaintiffs only had claims under §113(f), on which they bore the burden of proof.

so unusual as to warrant an unrequested remand. *See* App. 57a (stating only that reopening of the record may be appropriate "in the unusual circumstances of this case," without any explanation or citation to facts or law).

In fact, this case involved a simple failure of proof, solely within plaintiffs' control and based upon their tactical decisions to rely solely on the June 23rd stipulation as evidence of waste volume for four PRPs. Under those unexceptional circumstances – as the Third Circuit itself previously recognized – an appellate court "cannot remand" for further fact-finding. *EEOC*, 925 F.2d at 628. The Third Circuit apparently concluded otherwise in this case in an unwarranted attempt to "do justice," regardless of the plaintiffs' failure to prove their case. *See* App. at 53a (stating that "Carpenter gave the District Court ample reason to view it as highly culpable"). But as explained by this Court, "[c]ourts do not, or should not, sally forth each day looking for wrongs to right." *Greenlaw v. United States*, 554 U.S. 237, ___, 128 S. Ct. 2559, 2564 (2008) (quotations omitted).

A review of the case law, moreover, discloses that the Third Circuit's error is not without company, and that this Court's decisions governing remand have been inconsistently applied, and even ignored, by other courts of appeals. For example, in *United States v. Martinez*, 606 F.3d 1303 (11th Cir. 2010), the Eleventh Circuit held that the government failed to satisfy its burden of proof on a sentencing enhancement. Although it did not identify any "special circumstances" to support its decision, the court ordered a remand to allow the government to

reopen the record "even though it amounted to giving the party a second bite at the apple." 606 F.3d at 1305. *But see United States v. Hagenow*, 487 F.3d 539, 542 (7th Cir. 2007) (The government is not entitled to a remand to reopen the record on a sentencing enhancement where it "knew what it was required to introduce to meet its burden, and . . . [it] failed to do so."); *United States v. Leonzo*, 50 F.3d 1086, 1088 (D.C. Cir. 1995) (same). Other courts of appeals have similarly failed to heed this Court's guidance on the appropriate circumstances for a remand. *See, e.g.*, *Lodge 1858, Am. Fed'n of Gov't Employees v. Paine*, 436 F.2d 882, 898 (D.C. Cir. 1970) (holding that remand may be appropriate "even to afford a litigant a second opportunity to do something he should have done in the first place" before the district court); *Huffman v. United States*, 242 F.2d 835, 836 (9th Cir. 1957) (remanding case to reopen the record where plaintiff failed to prove facts essential to its case, even though "[i]t would not be unjust in the rough sense for appellant trustee to lose his appeal because of the inadequacy of the record presented here and to the district court").

In light of these divergent holdings, the Court should reaffirm the rule that when a court of appeals finds that a plaintiff failed to satisfy its burden of proof at trial, it "cannot remand" to reopen the record absent the "special circumstances" discussed above, which are not present here. *Weisgram*, 528 U.S. at 455-56; *Neely*, 386 U.S. at 329. A contrary rule would invite appellees to present a request for a remand in any appeal in which an appellant challenges the sufficiency of the evidence in support of a trial judgment. And allowing the Third Circuit's

remand to stand here would invite courts of appeals to remand cases under no standard, simply upon the invocation of "unusual circumstances," when none in fact exist. A rule of appellate practice that permits remands whenever the courts of appeals decide to, undermines basic precepts of legal procedure crucial to our adversarial system, including most importantly the requirement that a plaintiff meet its burden of proof.[9]

B. The Third Circuit's Remand Order Also Violates Established Rules Regarding the Waiver of Issues on Appeal.

Just as it violated well-settled principles regarding the propriety of remand, so too did the Third Circuit violate established rules of appellate procedure regarding the waiver of issues – another set of rules that are inconsistently applied by the courts of appeals. The Court also should exercise its supervisory authority to bring the practices of the courts of appeals, including the Third Circuit here, into line with established precedent on appellate waiver.

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[9] The statutory power of the federal appellate courts to order remands is rooted in 28 U.S.C. § 2106, which provides that the "Supreme Court or any other court of appellate jurisdiction may . . . require such further proceedings to be had as may be just under the circumstances." This Court has explained that appellate courts must exercise that grant of authority consistent with the requirements of the Constitution and applicable rules of procedure. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006).

Although Carpenter argued at every opportunity on appeal that the plaintiffs' evidence was insufficient to satisfy their burden of proof under § 113(f) – that is, in its opening brief, reply brief and at oral argument – the plaintiffs *never* requested a remand to reopen the record. Rather, they relied solely on the argument that they had satisfied their burden of proof. Litigants are required first to raise available issues or arguments when a matter is presented, and a failure to do so results in waiver of the matter in subsequent proceedings.[10] *See, e.g.*, *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998) (failure to raise issue in brief in opposition to petition for writ of certiorari constitutes waiver of issue); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Williams v. Leach*, 938 F.2d 769, 772 (7th Cir. 1991) (failure to raise issue in appellate brief constitutes waiver).

By failing to request a remand to reopen the record for additional evidence on their claims under § 113(f), the plaintiffs waived any argument that such a remand was appropriate. And the Third Circuit, which did not address the waiver issue at all, should not have sua sponte remanded with instructions that could give plaintiffs an unrequested and unwarranted second chance to prove their case

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[10] The waiver rule admits of few exceptions, none of which were invoked by the Third Circuit here. *See, e.g.*, *United States v. Hayes*, 515 U.S. 737, 742 (1995) (challenge to subject matter jurisdiction cannot be waived); *Gramegna v. Johnson*, 846 F.2d 675, 677 (11th Cir. 1988) (court may address otherwise waived issue to prevent manifest injustice).

under § 113(f). This Court has so determined. *See Forged Steel Wheel Co. v. Lewellyn*, 251 U.S. 511, 515-16 (1920) (court of appeals properly reversed trial verdict and directed judgment for defendant without remand because there "was no objection made to that action and no request for a remand of the case" before the court of appeals); *Neely*, 386 U.S. at 329 (same).

The plaintiffs also failed to timely raise any argument before the Third Circuit (or the District Court during post-trial submissions) that they could meet their burden under § 113(f) through the introduction of new evidence. In fact, plaintiffs steadfastly maintained before the Third Circuit that they satisfied their burden of proof to establish an equitable allocation based on volume.[11] Accordingly, had it followed settled law, the Third Circuit should have concluded that plaintiffs waived their ability to raise these arguments on remand. *See Labor Relations Div. of Constr. Indus. of Mass. v. Teamsters*

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[11] The Third Circuit correctly found that plaintiffs offered no evidence of the volumes of waste disposed at the Site of three plaintiffs and one defendant that settled during trial. In Appellees' Brief and at oral argument, plaintiffs argued that they satisfied their burden to prove these volumes with the June 23rd stipulation, which the Third Circuit properly found to be inadmissible against Carpenter. After oral argument, plaintiffs submitted letters pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, FED. R. APP. P. 28(j), claiming that certain invoices and purchase orders introduced at trial proved plaintiffs' own waste volume. The Third Circuit held that these documents were "not evidence of the plaintiffs' waste volumes" and were not relied upon by plaintiffs or the District Court. App. 51a n. 35.

Local 379, 156 F.3d 13, 17 (1st Cir. 1998) ("When a party could have raised an argument in his initial appeal, and failed to do so, he has generally waived his right to raise that argument on remand or on appeal from remand.").

The Third Circuit's failure to abide by the waiver rule is not an isolated incident, and the courts of appeals too often disregard the waiver rule without explanation or justification. *See, e.g.*, *United States v. Bergman*, 599 F.3d 1142, 1160 (10th Cir. 2010) (explaining that majority should not have ordered remand for additional fact-finding where appellee did not request remand) (Holmes, J., dissenting); *Lonberg v. City of Riverside*, 571 F.3d 846, 853 (9th Cir. 2010) (explaining that panel majority ignored appellant's double waiver of issue at trial and appeal) (Silverman, J., dissenting). *See also* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1256 (2002) ("[A]ppellate courts have failed to follow any consistent practice about *sua sponte* holdings.").

The waiver rule protects values that are fundamental to our judicial system. The waiver rule ensures that litigants have notice of the issues and arguments relevant to a case. When, as here, a court grants relief to a party on a basis it did not advance, the court deprives the opposing party of the opportunity to respond to the basis of the court's order, and the opposing party's due process right to a fair hearing is infringed. *Cf. Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1225-1226 (9th Cir. 1990) (holding that a district court's sua sponte

application of claim preclusion doctrine was not appropriate when the court did not allow briefing on issue); *N. Am. Coal Co. v. Miller*, 870 F.2d 948, 949 (3d Cir. 1989) (holding that due process was denied to a party that had no opportunity to respond to the basis of administrative law judge's award of relief against it). *See also* Miller, *supra*, at 1290 (concluding that sua sponte determinations by appellate courts deprive litigants of their due process rights to notice and an opportunity to be heard).

That is precisely what occurred in this appeal. Carpenter specifically requested both in its brief and at oral argument that the Third Circuit reverse the district court's judgment, and enter judgment in Carpenter's favor. Plaintiffs at no time, in briefing or at oral argument, requested or even raised the possibility of a remand if the Third Circuit held that plaintiffs did not meet their burden of proof. The Third Circuit's remand despite plaintiffs' failure to raise or preserve this issue deprived Carpenter of notice and an opportunity to defend itself on this dispositive issue, and denied Carpenter's due process rights.

The waiver rule also safeguards the adversarial nature of our judicial process. As this Court has explained, "our adversarial system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw*, 554 U.S. at ___, 128 S. Ct. at 2564 (quotation omitted).

In sum, the Court should exercise its supervisory authority to correct the Third Circuit's unwarranted departure from established law regarding appellate waiver, and to reaffirm the important function of the waiver rule in appellate practice.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. The Third Circuit contradicted *Atlantic Research* and CERCLA when it held that plaintiffs "incur" their own response costs for purposes of § 107 of CERCLA when they settle with parties that have entered into consent decrees with EPA to perform response actions at a Superfund site. The Third Circuit also ignored established precedent when, sua sponte, it remanded to allow plaintiffs a second opportunity to meet their burden of proof under § 113(f) of CERCLA for alleged "unusual circumstances," which simply did not exist.

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
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(2)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

CARPENTER TECHNOLOGY CORPORATION,

Petitioner,

v.

AGERE SYSTEMS, INC., CYTEC INDUSTRIES, INC., FORD MOTOR COMPANY, SPS TECHNOLOGIES, LLC AND TI AUTOMOTIVE SYSTEMS LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1814

AGERE SYSTEMS, INC.;
CYTEC INDUSTRIES, INC.; FORD MOTOR COMPANY;
SPS TECHNOLOGIES, LLC; TI GROUP AUTOMOTIVE
SYSTEMS, LLC

v.

ADVANCED ENVIRONMENTAL TECHNOLOGY CORPORATION; ASHLAND, INC.; CARPENTER TECHNOLOGY CORPORATION;
DIAZ CHEMICAL CORPORATION; FCG INC;
HANDY & HARMAN TUBE CO, INC.; NRM INVESTMENT COMPANY

Carpenter Technology Corporation,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-3830)
District Judge: Honorable Legrome D. Davis

Argued December 17, 2009

Before: SLOVITER, JORDAN and GREENBERG,
Circuit Judges.

(Filed: April 12, 2010)

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OPINION OF THE COURT

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JORDAN, *Circuit Judge*.

This appeal arises from nearly three decades of involvement by the Environmental Protection Agency ("EPA") at the Boarhead Farms Superfund Site in Bucks County, Pennsylvania (the "Boarhead Site" or the "Site"). At issue in the underlying case was the disposal of millions of gallons of toxic waste, over a six-year time period, by more than twenty parties, with millions of dollars of cleanup costs at stake. Along with the factual issues born of that history, the case implicates the still developing distinctions between liability under § 107(a) and § 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), codified together at 42 U.S.C. §§ 9601-9675 (collectively "CERCLA").

On June 18, 2002, five plaintiffs – Agere Systems, Inc. ("Agere"), Cytec Industries, Inc. ("Cytec"), Ford Motor Company ("Ford"), SPS Technology, LLC ("SPS"), and TI Automotive Systems LLC ("TI") (collectively "plaintiffs" or "appellees") – filed the present suit against twenty-three defendants for cost recovery and contribution under CERCLA and the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), 35 PA. STAT. ANN. § 6020.101-104 *et seq.*, to recover costs that the plaintiffs had paid to the EPA pursuant to certain consent decrees or that they had provided as a consequence of the cleanup of hazardous substances at the Boarhead Site. All of the defendants except one, Carpenter Technology Corporation ("Carpenter"), settled their liabilities with the

plaintiffs or were otherwise dismissed from the suit after a bench trial. On August 22, 2008, the United States District Court for the Eastern District of Pennsylvania entered judgment against Carpenter, finding it liable for 80% of the costs paid by the plaintiffs as of December 31, 2007, plus prejudgment interest. The Court also entered a declaratory judgment that Carpenter is liable for 80% of all cleanup costs that the plaintiffs may incur after January 1, 2008. The District Court denied Carpenter's motion to alter or amend the judgment, and Carpenter filed this appeal. For the following reasons, we will vacate the District Court's judgment and remand for proceedings consistent with this opinion.

I. Background

Beginning in 1972, DeRewal Chemical Corporation ("DCC"), a business that removed, transported, and disposed of chemical waste generated by other companies, began illegally dumping its customers' waste at the Boarhead Site. The dumping continued until 1976, when DCC was enjoined from bringing any chemicals to the Site.[1]

[1]Between 1973 and 1976, 1 the Bucks County Department of Health filed over fifteen Waste Discharge Inspection Reports regarding the Boarhead Site. On October 15, 1976, an injunction was issued preventing DCC from bringing any chemicals to the Site. In addition to the Boarhead Site, DCC disposed of its customers' waste at two other sites, known to the parties as the Ontario Street property and the Wissinoming Industrial Park. The former was a rental property that DCC took possession of on November 15, 1973, on Ontario Street in Philadelphia, Pennsylvania. On June 13, 1975, the Philadelphia Water Department sealed the lateral connection between the Ontario Street property and the city sewer system after the Department discovered that DCC was improperly disposing of chemical waste into the city sewer system from the

A. *EPA Actions at the Boarhead Site*

Between 1984 and 1986, the EPA completed an initial investigation of the contamination at the Boarhead Site. Based on the results of that investigation, the Site was added to the EPA's National Priorities List on March 13, 1989,[2] and thus became a Superfund site.[3] Later that year, the EPA performed a remedial investigation of the Site to identify whether there were contaminants that posed a risk to human health and the environment. That investigation revealed a variety of hazardous substances in the soil, sediments, and groundwater. In response, the EPA conducted several small-scale cleanup actions[4] over the next three years to address immediate risks.

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property. On May 6, 1976, the owner of DCC leased another site, through its subsidiary, located in the Wissinoming Industrial Park in Philadelphia. DCC eventually ceased use of that site as a result of concerns raised by the Philadelphia Water Department, the Philadelphia Police Department, and the EPA. Those two disposal sites are not the focus of the present appeal.

[2]"The NPL [2 National Priorities List] is the list of priority releases for long-term remedial evaluation and response." 40 C.F.R. § 300.425(b).

[3]Superfund sites are those hazardous waste sites listed on the EPA's National Priorities List. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND, http://www.epa.gov/superfund/index.htm (last visited March 5, 2010).

[4]In general, when we use the 4 term "action" throughout this opinion, we are using it to refer to environmental cleanup work, and not as a synonym for a lawsuit.

A report of the remedial investigation was published in January 1997, and, by the following July, the EPA issued a feasibility study that defined objectives for a larger-scale response with additional remedial actions.[5] In January 1998, the EPA produced its proposed remedial action plan, based on both the remedial investigation and the feasability study. Then, on November 18, 1998, it issued its Record of Decision ("ROD") respecting the Site.[6] The ROD was to be implemented in two stages, which, in the argot of the EPA, are referred to as "operable units." An operable unit is a "discrete action that comprises an incremental step toward comprehensively addressing site problems." 40 C.F.R. § 307.14. The two planned for the Boarhead Site were designated as Operable Unit One ("OU-1") and Operable Unit Two ("OU-2").[7]

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[5]*See infra* note 29 regarding the definitions of remedial actions and removal actions.

[6]"A ROD provides the justification for the remedial action (treatment) chosen at a Superfund site. It also contains site history, site description, site characteristics, community participation, enforcement activities, past and present activities, contaminated media, the contaminants present, scope and role of response action and the remedy selected for cleanup." U.S. ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND INFORMATION SYSTEMS, RECORD OF DECISION SYSTEM, http:/www.epa.gov/superfund/sites/rods/ (last visited Dec. 30, 2009).

[7]OU-1 addressed groundwater extraction, metal precipitation, air stripping, the installation of wells, residential water treatment, phytoremediation, and the installation of institutional controls and monitoring for OU-1. OU-2 addressed soil aeration and treatment of volatile organic compound hotspots, the excavation and off-site disposal of buried drums, and the implementation of institutional controls and monitoring for OU-2.

i. *The OU-1 Consent Decree*

On June 2, 2000, the EPA commenced a suit in the District Court against Cytec, Ford, and SPS, under § 107 of CERCLA, 42 U.S.C. § 9607,[8] by filing a complaint along with a consent decree that those parties had executed (the "OU-1 Consent Decree"). The District Court approved the OU-1 Consent Decree on September 28, 2000. Pursuant to the mandates of the decree, as well as an administrative order,[9] Cytec, Ford, and SPS were required to do the work contemplated for OU-1 and to reimburse the EPA for its administrative and oversight costs in connection with the OU-1 cleanup.

Cytec, Ford, and SPS subsequently entered into a separate settlement agreement with Agere, TI, and two other companies, whereby they all agreed to collectively fund and perform OU-1 work and to otherwise comply with the OU-1 Consent Decree. All seven of those companies, which, for convenience, we will call the "OU-1 group," have contributed to trust accounts from which various contractors have been paid and will continue to be paid to perform the work required by the OU-1 Consent Decree.

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[8]As more fully discussed herein, § 107 authorizes the United States or a state or "any other person" to seek reimbursement for removal or remedial costs incurred in responding to releases of hazardous substances as defined by CERCLA, provided that those actions are consistent with the national contingency plan. *See* 42 U.S.C. § 9607(a). The national contingency plan has been called "the federal government's roadmap for responding to the release of hazardous substances." *Niagara Mohawk Pwr. Corp. v. Chevron U.S.A., Inc.*, No. 08-3843-CV, 2010 WL 626064, at *3 (2d Cir. Feb. 24, 2010).

[9]Plaintiffs Cytec, Ford and SPS are also signatories to an EPA Administrative Order for Consent for Remedial Design executed in February 2000.

ii. *The OU-2 Consent Decree*

On December 6, 2001, the EPA commenced another suit in federal court under § 107 against Cytec, Ford, SPS, and TI, by filing a complaint and a second consent decree that those parties had executed (the "OU-2 Consent Decree"). The District Court approved the OU-2 Consent Decree on March 14, 2002. Pursuant to that decree and, again, an administrative order,[10] the Court ordered Cytec, Ford, SPS, and TI to do four things: (1) do the work contemplated for OU-2; (2) reimburse the EPA for approximately $7 million in costs related to removal actions at the Boarhead Site that the EPA had incurred prior to July 2000;[11] (3) reimburse the EPA for a yet-to-be-determined amount of response costs incurred after July 2000; and (4) reimburse the EPA for its other future response costs in connection with OU-2 work.

Ford, Cytec, SPS, and TI subsequently entered into a separate, private settlement with Agere whereby the parties agreed to collectively fund and perform OU-2 work and to otherwise comply with the OU-2 Consent Decree. Again for convenience, we will refer to those five companies as "the OU-2 group." In a fashion similar to the OU-1 group, the five members of the OU-2 group contributed to group trust accounts from which they paid and will

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[10]Plaintiffs Cytec, 10 Ford, SPS, and TI are also signatories to an EPA Administrative Order for Consent for Remedial Design, executed on October 17, 2001.

[11]The significance of July 2000 as a pivotal point in the timing of EPA's costs and calculations is not clear from the record.

continue to pay various contractors to perform the work required by the OU-2 Consent Decree.

On March 30, 2007, in exchange for $400,000, Agere (which had never itself been sued by the EPA), assigned to Cytec, Ford, SPS, and TI its claims to recover the approximately one million dollars it had paid into the OU-1 and OU-2 group trust accounts.[12]

iii. *Carpenter*

DCC collected and disposed of waste at the Boarhead Site from more than twenty customers between 1972 and 1977. Carpenter was one of those customers and is a Delaware corporation with its principal place of business in Reading, Pennsylvania.

Carpenter received a notice from the EPA concerning the Boarhead Site, dated September 28, 2000, asking it to resolve its potential liability to the EPA for past cleanup costs and further asking that it agree to perform work required by the EPA's 1998 ROD, excluding the work outlined in the OU-1

[12]While none of the 12 parties has raised the issue, we are left to wonder whether Agere has standing to bring the present suit against Carpenter after having assigned to others its right to recover the amounts it paid into the OU-1 and OU-2 group trust accounts. Whether or not Agere has standing, however, we refer to the claims which originated with it as being "Agere's claims," since, whether held by Agere or assignees, the claims themselves remain. On remand, the District Court should determine who holds these claims and, specifically, to what extent, if any, Agere retains standing. This opinion and accompanying judgment order are, obviously, to be understood as permitting recovery by the parties in interest only.

Consent Decree.[13] The letter included a list of ten previous recipients of similar letters from the EPA concerning the Boarhead Site. Carpenter did not comply with the requests in the letter.

B. *Present Suit*

On June 18, 2002, the five plaintiffs in this suit – Agere, Cytec, Ford, SPS, and TI – filed their original complaint in the District Court against twenty-three defendants,[14] seeking cost recovery and contribution under CERCLA and under the HSCA to recoup costs they had paid to the EPA pursuant to one or more consent decrees or had reimbursed to one another, all relating to the cleanup of hazardous substances at the Boarhead Site. By January 21, 2008, the plaintiffs had filed a fifth amended complaint and seven defendants remained.[15] When the bench trial commenced on June 23, 2008, only

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[13]The basis for that exclusion has not been explained on appeal.

[14]The original defendants included the following parties: Advanced Environmental Technology Corporation; Ashland Chemical Company; Boarhead Corporation; Carpenter; Crown Metro, Inc.; Diaz Chemical Corporation; Etched Circuits, Inc.; fcg, Inc.; Globe Disposal Co., Inc.; Handy & Harman Tube Company, Inc.; Knoll, Inc.; Merit Metals Products Corporation; Novartis Corporation; NRM Investment Company; Plymouth Tube Company; Quickline Design and Manufacturing Company; Rahns Specialty Metals, Inc; Rohm and Haas Company; Simon Wrecking Co., Inc.; Techalloy Co., Inc.; Thomas & Betts Corporation; Unisys Corporation; and the United States of America Department of Navy.

[15]At the time of the fifth and final amended complaint, the defendants included Advanced Environmental Technology Corporation; Ashland Chemical Company; Carpenter; Diaz Chemical Corporation; fcg, Inc; Handy & Harman Tube Company, Inc.; and NRM Investment Company.

two defendants were left, Handy & Harman Tube Company, Inc. ("H&H") and Carpenter.[16] After trial, H&H was granted an unopposed motion to dismiss, leaving Carpenter as the sole remaining defendant.

i. *Stipulations*

The parties[17] entered into several stipulations before and during trial, to narrow the factual and legal issues before the District Court. First, they signed a stipulation of background facts, many of which have been noted here already.[18] Second, on June 19, 2008, they stipulated to the volume of waste that DCC collected from fifteen other companies, fourteen of which were defendants. Carpenter's waste was not included in that stipulation. Third, on June 23, 2008, the plaintiffs and defendant H&H stipulated to the volume of waste that DCC collected from three of the plaintiffs – Cytec, Ford, and SPS – and from H&H. Importantly, Carpenter did not join that stipulation. Finally, on July 1, 2008, the plaintiffs, Carpenter, and H&H stipulated to the fact that the waste described in the June 23 stipulation was hazardous waste as defined by CERCLA. They also stipulated that DCC had not hauled any waste from TI or Agere to the Boarhead Site. Thus, while

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[16]By the time of the bench trial, all of the other defendants had either settled or had been granted unopposed motions to dismiss or unopposed summary judgment motions.

[17]From this point forward, references to "the parties" are to the named plaintiffs in this suit and Carpenter, unless the context dictates otherwise.

[18]The exact date on which the parties entered into this stipulation is not entirely clear from the record. The signature page, however, suggests that the date might have been June 18, 2008. (*See* App. at 14:A6390.)

the effect of the July 1st stipulation is contested, it is undisputed that Carpenter never directly stipulated to the volume of waste that Cytec, Ford, SPS, and H&H had contributed to the Boarhead Site.

ii. *Bench Trial*

Pursuant to CERCLA, the District Court's responsibility included "allocat[ing] response costs among liable parties using such equitable factors as the court determine[d] [to be] appropriate." 42 U.S.C. § 9613(f)(1). The Court decided that the parties' various volumes of waste at the Boarhead Site constituted the most equitable basis upon which to allocate costs. Hence, the purpose of the bench trial, held in July of 2008, was to figure out as a matter of fact what those volumes were, including the volumes attributable to Carpenter. The Court also held that culpability and the degree of cooperation the parties had demonstrated in dealing with the cleanup should be considered in allocating response costs.

The District Court found that the plaintiffs had incurred costs totaling $13,678,378.55 as of December 31, 2007.[19] The Court then concluded that those costs had been incurred of necessity in complying with the requirements of the ROD. The Court also held that cleanup at the Boarhead Site must continue until the organic and inorganic contaminants in the groundwater reach an

[19] The costs broke down as follows:

- Agere: $902,152.49
- Cytec: $3,368,551.07
- Ford: $3,354,122.22
- SPS: $3,354,122.22
- TI: $2,699,430.55

acceptable level as set forth by the EPA in the ROD. Thus, the Court noted, the plaintiffs will continue to incur costs for the foreseeable future.

To prove the waste volumes at the Site, the plaintiffs presented testimony from truck drivers who had been employed by DCC. Based on that testimony and the above-described stipulations, the Court calculated the volume of waste that DCC collected from each of the parties, and then calculated what percentage of that waste was disposed of at the Boarhead Site. Regarding Carpenter's waste volumes, the Court also had the benefit of Carpenter's business records, which confirmed parts of the testimony of the DCC drivers. The Court found that Carpenter's waste constituted 62.6% of the hazardous waste disposed of at the Boarhead Site.[20]

The plaintiffs also presented evidence that in 1969 Carpenter hired two waste collection companies, Revere Chemical Company ("Revere") and Echo, Inc. ("Echo"), to haul its waste acids. Carpenter knew that Manfred DeRewal, who later founded DCC, was the president of Revere and Echo. The evidence showed that in 1970 Carpenter learned that Revere and Echo were shut down for unlawful

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[20]The 62.6% was calculated as follows: the Court found that the volume of waste disposed of at the Boarhead Site from all of the plaintiffs, and the settled and dismissed parties, as well as Carpenter, was 1,594,668 gallons. The Court found that the total volume of waste disposed of at the Boarhead Site by Carpenter was 998,284 gallons. Thus, the Court determined that Carpenter's percentage share of the total volume was 62.6 %.

polluting practices.[21] Nevertheless, in June 1973, Carpenter hired DCC, which Carpenter knew was owned by DeRewal, simply because DCC's bid was significantly below the competing bids. Because "Carpenter relinquished its potent waste acids to a known polluter," and because Carpenter did not cooperate with the EPA, the Court allocated to Carpenter an additional 17.4% of the total clean-up cost – 8.7% for repeatedly working with a known polluter and 8.7% for not cooperating with the EPA – holding that "culpability is an appropriate equitable factor in resolving contribution claims." (App. at 1:A72.)[22] In other words, the Court adjusted Carpenter's share of liability above what it had determined to be Carpenter's volumetric share of waste, based on Carpenter's significant culpability in creating a Superfund site and its lack of cooperation in cleaning it up.

On August 22, 2008, the District Court entered judgment against Carpenter, finding it liable for 80% (62.6% plus 8.7% plus 8.7%) of the $13,678,378.55 paid by the plaintiffs as of December 31, 2007, plus prejudgment interest. That resulted in a judgment of $10,942,702.84 against Carpenter. The remaining 20% of liability was allocated to the plaintiffs. The Court also entered a declaratory judgment that Carpenter is liable for 80% of all future costs, as measured from January 1, 2008, for

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[21]The record is not clear as to what regulatory authority or authorities decided that Revere and Echo could no longer operate.

[22]We refer to the appendix on appeal by the volume number followed by a colon and the page number on which the cited material appears, followed by specific paragraphs, if applicable.

response actions pursuant to the OU-1 and the OU-2 Consent Decrees. Finally, the Court found that Carpenter's liability under the HSCA parallels its liability under CERCLA.

Carpenter filed a motion to alter or amend the judgment, which the District Court denied on February 20, 2009. Carpenter then filed a timely notice of appeal to our Court.

II. Statement of Jurisdiction and Standard of Review

The District Court had jurisdiction over the plaintiffs' CERCLA claims pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1331. It had supplemental jurisdiction over the HSCA claims under 28 U.S.C. § 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291.

"We may set aside [a] district court's findings of fact only if they are clearly erroneous." *FMC Corp. v. U.S. Dep't. of Commerce*, 29 F.3d 833, 838 (3d Cir. 1994); *cf. In re Fruehauf Trailer Corp.*, 444 F.3d 203, 210 (3d Cir. 2006) (explaining that "[f]actual findings may only be overturned if they are completely devoid of a credible evidentiary basis or bear no rational relationship to the supporting data" (citation omitted) (internal quotation omitted)).

However, we review a district court's allocation of CERCLA response costs for abuse of discretion. *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 446 n.18 (3d Cir. 2005). "An abuse of discretion occurs when 'the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion

of law or an improper application of law to fact.'" *Id.* (quoting *Int'l Union v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir. 1987)).

Finally, we exercise plenary review over a district court's interpretation of CERCLA, including statute of limitations issues. *United States v. Se. Pa. Transp. Auth.*, 235 F.3d 817, 822 (3d Cir. 2000); *see also New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997) (explaining that, in approaching a statute of limitations issue, we must "exercise plenary review over the district court's interpretation of the relevant CERCLA ... provisions").

III. Discussion

A. *Statutory Background Law*

All of Carpenter's contentions on appeal involve the plaintiffs' claims under CERCLA § 107(a) for cost recovery and § 113(f) for contribution. Thus, we present a brief overview of those two statutory remedies before addressing Carpenter's specific contentions.

CERCLA provides two mechanisms that allow potentially responsible parties ("PRPs") to recover costs they have expended to decontaminate a polluted site: § 107(a) cost recovery claims and § 113(f) contribution claims. The first option, § 107(a), provides that PRPs are liable for "any ... necessary costs of response incurred by any other person"

consistent with CERCLA.[23] 42 U.S.C. § 9607(a)(4)(B). Section 107(a) thus allows private parties to bring cost recovery suits against other PRPs,[24] and courts have developed several principles for application in such suits. 4 THE LAW OF HAZARDOUS WASTE § 14.01[2][c] (Susan M. Cooke, ed., 2009). Significantly, § 107(a) allows for complete cost recovery under a joint and several liability scheme. *See N.J. Tpk. Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3d Cir. 1999). Initially, "[w]hen CERCLA was first enacted, [§ 107 cost recovery] was the only remedy available, and [c]ourts struggled with whether PRPs (themselves liable for some of the cleanup) could invoke § 107 for contribution from other PRPs for their proportionate share of the costs as opposed to full cost recovery." *Niagara Mohawk Pwr. Corp.*, 2010 WL 626064, at *3.

Congress ultimately provided the language necessary to authorize contribution under CERCLA when it added § 113 to the statutory scheme with the passage of SARA. *Id.* at *3. Section 113(f) specifically is a second means of recouping cleanup costs, and it, in turn, provides two avenues of relief. Under § 113(f)(1), a PRP can seek contribution from another

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[23]Section 107(a) actually says "consistent with the national contingency plan," *see* 42 U.S.C. § 9607(a), which, as noted above (*supra* note 8), is the federal government's plan for responding to releases of hazardous substances. *Niagara Mohawk Pwr. Corp.*, 2010 WL 626064, at *3.

[24]Section 107 also provides the EPA with a mechanism to recover costs from PRPs, stating that PRPs are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). This aspect of § 107 is not at issue in the present matter.

PRP during or following a CERCLA suit brought against the first PRP. 42 U.S.C. § 9613(f)(1); *see also United States v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007) (explaining that "[s]ection 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under [CERCLA]"). Likewise, under §113(f)(3)(B), PRPs who resolve their liability to the United States or an individual State through an administratively or judicially approved settlement can seek contribution from another PRP. 42 U.S.C. § 9613(f)(3)(B); *see also Atl. Research Corp.*, 551 U.S. at 139 n.5 ("Similarly, § 113(f)(3)(B) permits a PRP to seek contribution after it 'has resolved its liability to the United States or a State ... in an administrative or judicially approved settlement ... .'" (quoting 42 U.S.C. § 9613(f)(3)(B))).

In *Atlantic Research*, the Supreme Court endeavored to clarify the relationship between § 107(a) cost recovery claims and § 113(f) contribution claims, noting that those remedies are distinct. *See Atl. Research Corp.*, 551 U.S. at 138 ("[Sections] 107(a) and 113(f) provide two 'clearly distinct' remedies. 'CERCLA provide[s] for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B).'" (quoting *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 163 n.3 (2004))). With regard to § 113(f) contribution claims, the Court held that a private party may not bring a contribution claim unless it has been sued under § 106 or § 107 of CERCLA.25[25] *See Cooper*

[25]Section 106 authorizes the United States to bring a suit seeking injunctive relief to abate "imminent and substantial endangerment" resulting from the release of a hazardous substance. The section also authorizes the EPA to

Indus., Inc. 543 U.S. at 168 (explaining that § 113(f) "authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a)"); *see also Atl. Research Corp.*, 551 U.S. at 139 ("Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under [CERCLA]."). With regard to § 107(a) cost recovery claims, the Court held that a private party who voluntarily undertakes a cleanup action – and is therefore unable to sue under § 113(f) because it "remediated the hazardous material [] without the judicial spur of § 106 or § 107" – can seek recovery of response costs under § 107(a)(4)(B). *Niagara Mohawk Pwr. Corp.*, 2010 WL 626064, at *3 (describing *Atl. Research Corp.*, 551 U.S. at 139). Thus, a private party may recover under § 107(a) without any establishment of liability on its part to a third party, including the government. *Atl. Research Corp.*, 551 U.S. at 139.

In short, the Court summarized the distinction as follows:

> [T]he remedies available in §§ 107(a) and 113(f) complement each other by providing causes of action to persons in different procedural circumstances ... . Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under ... § 107(a). And § 107(a)

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issue an administrative order to abate such a condition. *See* 42 U.S.C. § 9606; *see also* 4 THE LAW OF HAZARDOUS WASTE § 14.02[1][c] (Susan M. Cooke, ed., 2009).

> permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs.

Id. (citations omitted) (internal quotations omitted). Despite this clarification, navigating the interplay between § 107(a) and § 113(f) remains a deeply difficult task. *See New York v. Solvent Chem. Co., Inc.*, No. 83-CV-1401-JTC, 2010 WL 376328, at *67 (W.D.N.Y. Jan. 26, 2010) ("[R]ecent rulings have done little to provide the lower courts with useful guidance in determining which subsection of CERCLA provides a cause of action for parties seeking reimbursement of response costs in differing situations."); *see also id.* at *64 ("Perhaps most perplexing is the interplay between the two cost recovery provisions which this court must apply in resolving the difficult factual and legal issues."). The sometimes blurry relationship between § 107(a) cost recovery claims and § 113(f) contribution claims is a theme to which we will return repeatedly in this opinion.

B. *Issues on Appeal*

The issues raised by Carpenter on appeal can be grouped into six overarching contentions.

The first is that plaintiffs Cytec, Ford, SPS, and TI cannot bring a § 113(f) contribution claim for the approximately $7 million they paid to the EPA under the OU-2 Consent Decree to reimburse the EPA for its response costs because the EPA's suit to enforce the OU-2 Consent Decree was time-barred. According to Carpenter, it does not share a common liability with those plaintiffs because none of the

plaintiffs could have been sued by the EPA at the time they chose to settle with the agency.

Second, Carpenter argues that Agere and TI cannot bring a § 107(a) cost recovery claim for sums they paid pursuant to private settlements with other plaintiffs, as opposed to sums paid to the EPA directly, because § 107(a) does not allow for the recovery of such payments.

Third, Carpenter argues that those plaintiffs who signed the OU-1 and OU-2 Consent Decrees – Cytec, Ford, and SPS – as well as TI, who signed the OU-2 Consent Decree only, do not have § 107(a) cost recovery claims for costs expended pursuant to the OU-1 and OU-2 Consent Decrees because, once a party has been sued or has settled under CERCLA, that party may pursue only a § 113(f) contribution claim. Thus, Carpenter contends, those plaintiffs have nothing but § 113(f) available as a vehicle for trying to recover the amounts they expended to comply with the OU-1 and OU-2 Consent Decrees.

Fourth, recognizing that the District Court proceeded under § 113(f) with regard to those claims, and not under § 107(a), Carpenter argues that Cytec, Ford, SPS, and TI failed to present evidence of the total volume of waste disposed of at the Boarhead Site and, therefore, the District Court's allocation of liability among the parties under § 113(f) cannot stand. Specifically, Carpenter argues that, other than the stipulation that it refused to sign, the plaintiffs have failed to introduce any evidence of the volume of waste for which Cytec, Ford, SPS, and H&H are responsible. Without evidence as to those parties, says Carpenter, it is impossible to know the

total volume of waste disposed of at the Boarhead Site.

Fifth, Carpenter argues that the District Court erred in three ways in its cost allocation. First, Carpenter contends that the Court miscalculated the volumetric share of waste that former defendant NRM sent to the Boarhead Site. Next, Carpenter says that the Court did not consider other defendants' culpability or lack of cooperation with the EPA to the same extent that it considered Carpenter's lack of cooperation and culpability. As its last cost allocation point, Carpenter contends that the District Court wrongly considered the settling defendants' volumetric share of waste, rather than the dollar amounts that the plaintiffs obtained from those settling defendants, when the Court performed its equitable allocation.

Sixth and finally, Carpenter argues that, since § 702(a)(3) of the HSCA mirrors § 107(a)(4)(B) of CERCLA, the plaintiffs do not have a viable claim under that section of the HSCA, for the same reasons that Carpenter believes the plaintiffs do not have a claim under § 107 of CERCLA.

C. *Cytec, Ford, SPS, and TI's § 113(f) Claim for Reimbursement of Payments Made to the EPA for Past Costs*

i. *Background*

The OU-2 Consent Decree obligated the plaintiffs who signed it – Cytec, Ford, SPS, and TI – to reimburse the EPA for a percentage of past response costs that the EPA had incurred in various

removal efforts at the Boarhead Site, including work related to the OU-1 Consent Decree. Specifically, pursuant to the OU-2 Consent Decree, Cytec, Ford, SPS, and TI agreed, among other things, to reimburse the EPA for approximately $7 million in response costs incurred and accounted for prior to July 2000. In their fifth amended complaint, those four plaintiffs asserted a contribution claim under § 113(f), seeking reimbursement from Carpenter for that $7 million.

On appeal, Carpenter argues that the plaintiffs cannot recover the $7 million because there was no "common liability" among Carpenter and the plaintiffs at the time the plaintiffs settled with the EPA, as required by *Atlantic Research*. More particularly, Carpenter contends that no common liability exists because, when the EPA brought suit against the plaintiffs on December 6, 2001 to enforce the OU-2 Consent Decree, that suit, and therefore any hypothetical suit against Carpenter, was time-barred. The plaintiffs, of course, say that Carpenter is mistaken about the statute of limitations.

ii. The Statute of Limitations to Recover Past Costs

Contribution claims under § 113(f) require a "common liability" among PRPs at the time the underlying claim is resolved. *See Atl. Research Corp.*, 551 U.S. at 139 ("[A] PRP's right to contribution under § 113(f)(1) is contingent upon ... common liability among liable parties."); *In re Reading Co.*, 115 F.3d 1111, 1224 (3d Cir. 1997) ("Contribution, by its own definition, requires a common liability for the same injury."), *abrogation on other grounds*

recognized by E.I. DuPont De Nemours & Co. v. United States, 460 F.3d 515, 518 (3d Cir. 2006). Thus, Carpenter correctly asserts that, in order for it to be liable under § 113(f), it must have had a "common liability" with the plaintiffs at the time the EPA filed suit to enforce the OU-2 Consent Decree. In other words, the EPA claim must have been viable against both the plaintiffs and Carpenter at the time the EPA sought to enforce the OU-2 Consent Decree; otherwise, there is no "'common liability' to serve as the basis of a contribution action." (Appellant's Op. Br. at 14.) Hence, this contention boils down to a question about the applicable statute of limitations.

The timeliness of an EPA suit to recover costs associated with a removal action is governed by § 113(g)(2), which requires that any such suit be brought "within 3 years after completion of the removal action." 42 U.S.C. § 9613(g)(2)(A). At the same time, the statute provides for three exceptions that extend the limitations period. Before addressing those, however, we must describe more fully Carpenter's statute of limitations argument and an essential flaw in the District Court's decision.

Carpenter argues that the EPA's claim is time-barred because the EPA completed its removal action on November 18, 1998, but did not initiate its lawsuit against the plaintiffs until December 6, 2001, more than three years after the completion of the removal action. As Carpenter sees it, since none of the exceptions to the three-year statute of limitations apply, the EPA's lawsuit against the plaintiffs was untimely, and, if Carpenter had been named as a defendant, the EPA's claims against it would have been untimely too. Carpenter has rightly identified

the completion of the removal action as the point from which the statute of limitations begins to run. The District Court held that the EPA "conducted a single 'removal action' which ended, at the earliest, on November 18, 1998, when EPA issued the ROD." (App. at 1:A64.) In an accompanying footnote in its opinion, however, the Court said, "[i]t is more likely that EPA's removal action was ongoing as of September 28, 2000." (App. at 1:A64 n.38.) Despite its "at the earliest" caveat when citing the November 18, 1998 date, and also despite its comment on the "more likely" course of events, the District Court went on to say that, in order to give Carpenter every reasonable consideration, it would "select[]" the November 18, 1998 date as the date that the EPA completed the removal action. (*Id.*)

Given the magnitude and complexity of the record, as well as the decades of EPA involvement at the Boarhead Site, we can appreciate the difficulty in determining the time frame within which the EPA completed its removal action. Nevertheless, by stating that it was "more likely" that removal work was ongoing on September 28, 2000, but then "select[ing]" the earlier date of November 18, 1998 as the date that work was completed, the Court has left a legally significant ambiguity in the record. There is no clear finding of fact as to a date or even a range of dates within which the EPA's removal work was completed.

Of course, a court may, for analytical purposes, assume facts in favor of a party to demonstrate that, even under that party's most advantageous view of the record, legal relief is unavailable. That appears to have been the District Court's intention here.

Nevertheless, the opinion is not entirely clear and there is a strong implication that the completion date of the EPA's removal work was later than the selected date, which, if true, is of real importance in this case. If the removal work was ongoing as of September 28, 2000, as indicated by the Court, then the applicability of complicated exceptions to the three year statute of limitations becomes irrelevant, and the EPA's suit was timely regardless of those exceptions.

Because the District Court has not made a factual finding sufficient to determine whether or not the EPA's December 6, 2001 enforcement suit for the OU-2 Consent Decree was timely under the three-year statute of limitations, we will vacate the judgment and remand for the Court to make an unequivocal finding as to the date or time period within which the EPA completed its removal action, if such a finding is possible.[26] To the extent the District Court needs to reopen the record in order to resolve this ambiguity, it may do so, since Carpenter's statute of limitations defense makes the date on which the EPA completed its removal action a potentially claim-dispositive fact.[27]

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[26]We do not discount the 26 possibility that the District Court did not make a definitive finding because the record would not support one. Also, if the District Court's finding of fact turns out to be that the removal action ended sometime after September 28, 2000, that will be sufficient, since, with that finding, Cytec, Ford, SPS, and TI's claims to recover for their approximately $7 million reimbursement to the EPA for past response costs would be timely, as is more fully discussed herein. *See infra* Section III.C.iii.

[27]We also ask the District Court to make a definitive finding as to the amount that the OU-2 plaintiffs paid to reimburse the EPA for past costs. While the stipulated facts cite the amount as $7 million in one place, in another place it

iii. The Exceptions to the Three-Year Statute of Limitations Period

As the District Court rightly recognized, the EPA's suit to recover past costs could still be timely even if the earlier November 18, 1998 date is correct, assuming that an exception to the statute of limitations applies. Though there are three exceptions generally available, the only one possibly of consequence is found in 42 U.S.C. § 9613(g)(2)(B), which is the one the District Court applied.[28]

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appears to be approximately $7.4 million, and Carpenter cites the amount as $ 7.4 million. (*Compare* App. at 14:A6379 ¶ 40, *and* App. At 14:A6383 ¶ 59, *with* Appellant's Op. Br. at 13.)

[28]The two other exceptions to the three-year statute of limitations are of no practical effect. The first exception, the "subsequent action" exception, is simply not applicable. That exception pertains to situations in which the EPA has brought more than one legal action (and here the term "action" is being used as a synonym for "lawsuit") against the plaintiffs to recover costs. The statute provides that if the EPA's suit is a "subsequent action" to recover further response costs (i.e., there has already been an "initial action" to recover response costs), the suit must be commenced no later than 3 years after the date of completion of the initial action. *See* 42 U.S.C. § 9613(g)(2). A "subsequent" suit for further response costs can "be maintained at any time during the response action, but [it] must be commenced no later than 3 years after the date of completion of the response action." *Id.* § 9613(g)(2)(B). The plaintiffs argue that the EPA's 2001 suit was a timely subsequent action, because the three-year limitations period applies only to the EPA's initial action, which they identify as the EPA's June 2, 2000 suit against Cytec, Ford, and SPS to enforce the OU-1 Consent Decree. Appellees contend that "[i]t does not matter that Carpenter was not a defendant in the 2000 EPA action" because the statute does not indicate that the defendant must have been a party to the initial action. (Appellees' Ans. Br. at 23.) That argument fails. The EPA sued Cytec, Ford, and SPS in 2000, but not Carpenter. Thus, the only parties against which the EPA brought a subsequent action in 2001 are Cytec,

Ford, and SPS. As a result, the "subsequent action" exception is inapplicable here. *See United States v. Navistar Int'l Transp.*, 152 F.3d 702, 710 (7th Cir. 1998) ("We believe that, from the language and structure of the statute, a 'subsequent action ... for further response costs' must be one brought against the same party or parties against which an 'initial action' to recover such costs has been maintained." (quoting 42 U.S.C. § 9613(g)(2)).).

The second exception is an alternative limitations period that may well be applicable here. That exception states that when the EPA grants a consistency waiver under § 104(c)(1)(C) to extend the removal action, the limitations period is six years, rather than three years, from the date of a determination to grant that waiver. *See* 42 U.S.C. § 9613(g)(2)(A). In other words, the EPA must bring its suit within six years of the grant of a consistency waiver, regardless of when its removal action is completed. The parties have not defined the term "consistency waiver," but publicly available information from the EPA indicates that a consistency waiver "is an exemption to the statutory limits of two million dollars in expenditures ... for removal actions." Memorandum from Lon Biasco, On-Scene Coordinator with the U.S. Envtl. Prot. Agency, to Myron O. Knudson, Region 6 Superfund division Dir. of the U.S. Envtl. Prot. Agency, 9, http://www.epa.gov/region6/6sf/louisiana/ag_street/important_documents/action_memo_agstreet.pdf. The EPA performed a 1992 removal action at the Site pursuant to a consistency waiver it had granted on September 4, 1992. Under § 113(g)(2)(A), then, the EPA had to file its suit to recover those costs no later than September 4, 1998, six years from the grant of the waiver. Carpenter argues that since the EPA did not file the OU-2 suit until after 1998, the suit is barred under the "consistency waiver" exception. However, Carpenter concedes that the EPA's 1992 consistency waiver only applied to one specific remedial action, which cost $4.3 million. All of the EPA's other costs are not subject to the "consistency waiver" exception. Plaintiffs and Carpenter acknowledge that the EPA incurred costs on the order of $14 million and only sought reimbursement for $7.4 million. Thus, even accepting Carpenter's argument that $4.3 million of the EPA's past costs are time-barred, the EPA still has claims for approximately $10 million which are not time-barred under the consistency waiver exception. Therefore, the EPA's $7.4 million claim remains recoverable.

Section 9613(g)(2)(B) states that removal costs may be recovered as part of a remedial action suit, which effectively extends the statute of limitations to six years from the initiation of physical on-site construction of the remedial action. However, to recover such costs, the remedial action suit must be initiated within three years after the completion of the removal action.[29] *Id.* In other words, the

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[29]Removal actions are defined as

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5121 *et seq.*].

42 U.S.C. § 9601(23).

Remedial actions are defined as

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or

limitations period may be extended if the EPA attempts to recover removal costs during a remedial action suit, rather than in a removal action suit. *See id.* But, if the EPA seeks to do so, it must bring that remedial action suit "within 6 years after [the] initiation of physical on-site construction of the

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> minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

Id. § 9601(24).

remedial action," *and* the remedial action must be initiated within three years after the completion of the removal action. *Id.* Given the language of § 9613(g)(2)(B), we read the requirement that remedial action (i.e., remedial work at the site) be "initiated" within three years of completion of the removal action (i.e., removal work at the site) to mean that the physical on-site construction of the remedial action has to be initiated within that three-year time period. As Carpenter notes, any other interpretation of that language would create two different meanings of the word "initiate" in § 9613(g)(2)(B), and, more importantly would eviscerate the three-year statute of limitations period for removal actions contained in §9613(g)(2)(A).[30] Thus, whether the § 9613(g)(2)(B)

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[30]The text of the relevant provision is as follows:

> An initial action for recovery of costs ... must be commenced ... (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

42 U.S.C. § 9613(g)(2). When the drafters first used a form of the word "initiate" in this section, it is specified as being the "initiation of physical on-site construction of the remedial action." Thus, when the word "initiate" is used a second time, in the very next sentence, we read the statute to again mean the "initiation of physical on-site construction," rather than the initiation of some other environmental cleanup endeavor. As Carpenter persuasively argues, to read the statute otherwise undermines the statute of limitations:

> If EPA could use the six year limitation period in § 113(g)(2)(B) simply by incurring any type of response costs ... after issuance of the ROD, but before initiation of on-site construction of the remedial action, the three year limitations

exception applies in the present case is again dependent upon the time that the EPA completed its removal work.

Carpenter argues that the EPA completed its removal action on November 18, 1998, when it issued the ROD, because case law supports the idea that, for statute of limitations purposes, a removal action is complete upon the issuance of a ROD. (*See* Appellant's Reply Br. at 9 (citing, *inter alia*, *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 834-44 (6th Cir. 1995)).) Plaintiffs, however, note that in the OU-1 Consent Decree, filed September 28, 2000, the EPA stated that it "conducted [a] removal action at the Site beginning in the year 1992 and continuing to the present ... ." (App. at 5:A2132, ¶ G.) Thus, say the plaintiffs, the EPA has essentially affirmed that its removal action was ongoing as of September 28, 2000.

Again, as with the effect of the three-year statute of limitations, we cannot tell whether this exception applies because the District Court has not made a definitive factual finding as to when the EPA completed its removal action. Thus, we cannot determine whether the EPA initiated on-site physical construction of the remedial action within three years of the completion of its removal action.

> period for removal actions would never apply at any site at which remedial action occurs.

(Appellant's Reply Br. at 12.) This is because, by using the definition of "initiate" that the plaintiffs suggest (i.e., incurring any type of further response costs), the EPA could simply take any one of a variety of later steps that it could claim constitutes the commencement of a remedial action.

In sum, the EPA's lawsuit to recover past costs was timely if one of two circumstances is found to exist: either the date or time period that the EPA completed its removal action fell within three years of the EPA's OU-2 enforcement suit, or the EPA initiated on-site physical construction of the remedial action within three years of the completion of its removal action. If the first of these requirements is met, the suit was timely under the three-year statute of limitations. If the second is met, the six-year statute of limitations exception contained in § 113(g)(2)(b) would apply, allowing the filing to be timely.

D. *TI and Agere's § 107(a) Claims to Recover Costs Paid to Other Plaintiffs Pursuant to Settlement Agreements*

i. *Background*

Agere was not a party to either the OU-1 or the OU-2 Consent Decrees. However, Agere entered into a private settlement agreement with the plaintiffs who signed the OU-1 Consent Decree and a second private settlement agreement with the plaintiffs who signed the OU-2 Consent Decree. Pursuant to those agreements, Agere contributed to group trust accounts that funded the work associated with the consent decrees. Agere's total costs from contributing to both trust accounts were found to be $902,152.49.

Although TI was a party to the OU-2 Consent Decree, it was not a party to the OU-1 Consent Decree. However, TI entered into a private

settlement agreement with the plaintiffs who did sign the OU-1 Consent Decree, and, pursuant to that agreement, TI contributed to a group trust account that funded the work required by the OU-1 Consent Decree. TI's total costs from contributing to the OU-1 group trust account were found to be $308,961.37.

In their fifth amended complaint, Agere and TI asserted § 107(a) cost recovery claims for the amounts that they had paid pursuant to their settlement agreements with the other plaintiffs, and the District Court held that Agere and TI did indeed have such claims. On appeal, Carpenter argues that the District Court erred in that conclusion and that Agere and TI should be barred from recovering those sums.[31]

ii. *Section 107(a) Cost Recovery Claims*

The cost recovery available under § 107(a) is founded on the statutory language providing that PRPs shall be liable for "any other necessary costs of response incurred by any other person" consistent with CERCLA. 42 U.S.C. § 9607(a)(4)(B). The Supreme Court has held that "§ 107(a) permits a PRP to recover only the costs it has 'incurred' in cleaning up a site." *Atl. Research Corp.*, 551 U.S. at

[31]Plaintiffs argue that Carpenter waived this argument by failing to raise it before the District Court. Even if Carpenter had not raised the issue below, the District Court ruled on it when it held that Agere and TI had § 107(a) claims for costs they had contributed via the private settlement agreements. More to the point, though, Carpenter adequately preserved the issue when it argued, in its reply to the plaintiffs' proposed findings of fact and conclusions of law, that Agere and TI could not bring those § 107(a) claims.

139 (quoting 42 U.S.C. § 9607(a)(4)(B)). The Court has further explained that, "[w]hen a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred." *Id.*

Agere and TI are seeking to recoup costs that each paid pursuant to private settlement agreements with other plaintiffs – TI with regard to the OU-1 Consent Decree and Agere with regard to both OU-1 and OU-2 Consent Decrees. Their payments under the private settlement agreements were combined into group trust accounts with money paid by the signatories to the consent decrees, and those group trust accounts were then used to fund the OU-1 and OU-2 work. Carpenter argues that, in making those payments into group trust accounts, Agere and TI did not "incur" their own costs of response. Instead, says Carpenter, Agere and TI paid into the group trust accounts only to "satisfy a settlement agreement," and, pursuant to *Atlantic Research*, those payments cannot be considered "costs incurred," as required under § 107(a).

We disagree and will affirm the District Court in allowing Agere and TI to pursue § 107(a) claims for the amounts they have contributed to trust accounts funding the OU-1 and OU-2 work. We do not think the Supreme Court intended to deprive the word "incurred" of its ordinary meaning. Agere and TI put their money in the pot right along with the money from the signers of the consent decrees. The costs they paid for were incurred at the same time as the costs incurred by the signers of the consent decrees and for the same work. Those costs were

incurred in the ordinary sense that a bill one obligates onself to pay comes due as a job gets done. While the Supreme Court in *Atlantic Research* did hold that § 107(a) permits a PRP to recover only costs it has "incurred," and did suggest that costs paid pursuant to a settlement agreement are not such costs, those statements were not made in the context of payments made for on-going work.

Moreover, the Court appears to have made its statement about the unavailability of § 107(a) relief on the assumption that "a PRP that pays money to satisfy a settlement agreement ... may pursue a § 113(f) contribution." *Id.* In other words, while the Court indicated that parties seeking reimbursement for settlement payments do not have a § 107(a) claim, a basic premise of that holding was that those parties do have a § 113(f) contribution claim for their settlement amounts. We do not believe that the Court intended its holding to reach a circumstance like this, where Agere and TI do not have § 113(f) contribution claims for the settlement sums because those parties were never themselves sued for those amounts by the EPA or by other PRPs. *See Cooper Indus., Inc.*, 543 U.S. at 168 (explaining that § 113(f) authorizes contribution claims only for PRPs who have been subject to a civil action under CERCLA).

If we were to hold that Agere and TI cannot pursue § 107(a) claims for their settlement payments, they would be completely barred from recovering those amounts under CERCLA. To accept that outcome, one must imagine that Congress intended to penalize cooperative cleanup efforts by excluding from CERCLA's broad recovery provisions all PRPs who, like Agere and TI, agree to come

forward and assist in a cleanup even though they have not been subjected to a cost recovery suit. Such an intent is extremely unlikely, since the goal of CERCLA is "to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994); *see also W.R. Grace & Co. v. Zotos Int'l, Inc.*, 559 F.3d 85, 88 (2d Cir. 2009) ("[I]t has now been over twenty-five years since CERCLA's enactment, and although many of the provisions remain perplexing, the statute's primary purposes are axiomatic: (1) to encourage the timely cleanup of hazardous waste sites; and (2) to plac[e] the cost of that [cleanup] on those responsible for creating or maintaining the hazardous condition." (alterations in original) (citations omitted) (internal quotations omitted)).

When a company in the position of Agere and TI has not yet been sued by the EPA but appreciates that it bears some responsibility for cleaning up hazardous waste, the language of CERCLA, which is intended to encourage cleanup, ought not be interpreted to discourage participation in cleanup if a more consistent construction of the statute is plausible. Private actors are not likely to settle and step forward unless they know that they can seek some of the amounts they will contribute, just like of those who have been sued by the EPA or a PRP, or those who voluntarily clean up a site in the first instance. To encourage participation in environmental cleanup, the statute should be read in a way that assures PRPs like Agere and TI that they can later bring a § 107(a) cost recovery claim for the amounts they pay to help with the cleanup, even if those costs are related to a settlement obligation. *Cf.*

Steven Patrick, *Superfund: Second Circuit Says EPA Settlement Approval Is Unnecessary to Trigger Contribution Right*, 41 Daily Envtl. Rep. (BNA) A-10 (Mar. 4, 2010) (citing a Department of Justice amicus brief filed in *Niagara Mohawk Pwr. Corp.*, stating that "[i]t is important that PRPs ... that ... engage in response activities in settlements with states have appropriate CERCLA claims for contribution against other PRPs [because o]therwise PRPs will decline to enter into administrative settlements and instead wait for the filing of civil actions to ensure they can sue for contribution under Section 113(f)(1)."). Our holding is buttressed by the Supreme Court's description of § 107(a) and § 113(f) as "overlapping" remedies. *Atl. Research Corp.*, 551 U.S. at 139 n.6. It would be a stretch to describe the remedies as "overlapping' if they are actually intended to exclude an entire group of PRPs from both remedies.

Accordingly, we affirm the District Court's holding that TI (with regard to OU-1) and Agere (with regard to OU-1 and OU-2)[32] have § 107(a) cost recovery claims to recoup costs paid for cleanup work, even though the payments were made pursuant to settlement agreements. Those claims may thus go forward on remand.

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[32]We recognize that the OU-2 Consent Decree included a lump payment of $7.4 million in "past costs" to the EPA, and that Agere accepted responsibility for this amount as well. Specifically, Agere's share for these past costs was $83,000. While this specific amount could arguably be considered reimbursement rather then co-funding, the parties do not address this issue explicitly. Particularly, in light of the policy reasons outlined above, however, we are content to give the benefit of the doubt to Agere and believe that it is entitled to recover that amount.

E. *The District Court's Equitable Allocation for the Plaintiffs' Costs of Performing Work Under the OU-1 and OU-2 Consent Decrees*

i. *Background*

The District Court concluded that Cytec, Ford, and SPS had both § 107(a) and § 113(f) claims for the costs of performing work pursuant to the OU-1 and OU-2 Consent Decrees, and that TI had such claims with respect to the OU-2 Consent Decree. Carpenter argues that those plaintiffs have § 113(f) claims only, for the costs they incurred performing the work required by the consent decrees. They do not have § 107(a) claims, Carpenter says, because once a party has been sued or has settled under CERCLA its sole avenue of relief is a § 113(f) claim.

ii. *Sections 107(a) and 113(f)*

The Supreme Court, in *Atlantic Research*, left open the precise question raised by Carpenter's argument, namely, whether plaintiffs in the position of Cytec, Ford, SPS, and TI can bring a §107(a) claim in addition to a § 113(f) claim. The Court said,

> We do not suggest that §§ 107(a)(4)(B) and113(f) have no overlap at all. For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under ... § 107(a). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of

> response are recoverable under § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f). Thus, at a minimum, neither remedy swallows the other ... .

Id. (citations omitted); *see also Key Tronic Corp.* 511 U.S. at 816 (stating that the provisions provide "similar and somewhat overlapping remed[ies]"). Claims by Cytec, Ford, and SPS for costs of performing the OU-1 and OU-2 work, and TI's costs associated with OU-2, fall into the region of doubt identified by the Supreme Court in *Atlantic Research*. The costs were neither "incurred voluntarily," because the parties were in fact sued by the EPA, nor were they "reimbursed to another party," because they were expended in performing the OU-1 and OU-2 work directly. Rather, they are costs incurred pursuant to a consent decree following a CERCLA suit. *See W.R. Grace & Co.*, 559 F.3d at 93 n.7 ("As the Supreme Court suggested, it may well be that a party who sustains expenses pursuant to a consent decree following a suit under [CERCLA] may have a cause of action under either section 113(f), section 107(a), or both.").

The District Court correctly recognized that the claims of Cytec, Ford, SPS, and TI associated with the consent decrees fall within an "open question of law." (App. at 1:A59). Without explanation, the Court concluded that those plaintiffs have both § 113(f) and § 107(a) claims. Thus, while it

appears that the Court went on to allocate liability under § 113(f),[33] we are squarely confronted with the issue left open in *Atlantic Research*: whether, in addition to §113(f) claims, plaintiffs such as these have §107(a) claims for expenses sustained pursuant to a consent decree following a CERCLA suit. This is not simply a matter of academic interest. Were we to find that these parties have § 107(a) claims in addition to § 113(f) claims, the District Court could, on remand, decide to allocate liability under § 107(a) and potentially impose 100 percent of the liability on Carpenter pursuant to the joint and several liability available under that provision of the statute. For that reason, the parties have heavily briefed and vigorously argued the issue.

In *Atlantic Research*, immediately after setting forth this unanswered question, and after suggesting that there is, in fact, some "overlap" between § 107(a) and § 113(f), the Supreme Court stated that "a defendant PRP in such a § 107(a) [joint and several liability] suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim." 551 U.S. at

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[33]We read the D 33 District Court's opinion as proceeding under § 113(f) for the following reasons. First, the Court said as much when it held that "cooperation with the government is also an appropriate equitable factor to consider in allocating response costs under § 113(f)." (App. at 1:A73.) Second, the Court spent two pages of its opinion outlining the elements a plaintiff must prove under § 113(f), and then organized its analysis based on those elements. And, third, the Court held that "[c]ulpability is an appropriate equitable factor in resolving contribution claims" (App. at 1:A72), which, by use of the word "contribution," suggests that the District Court allocated liability under § 113(f). In addition, despite arguing that they have § 107(a) claims in addition to their § 113(f) claims, the plaintiffs concede that "the District Court determined the shares of each party without regard to those § 107(a) claims." (Appellees' Ans. Br. at 47.)

140. The Court explained that any fear that "PRPs will eschew equitable apportionment under § 113(f) in favor of joint and several liability under § 107(a)" is mitigated by the fact that "a § 113(f) counterclaim would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action." *Id.* at 138, 40. Unfortunately, the potential for an inequitable result remains in this case because Carpenter would not be able to bring a § 113(f) counterclaim against Cytec, Ford, SPS, and TI. Section 113(f)(2) would prevent it. That subsection states that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." U.S.C. § 9613(f)(2). Thus, if we allowed Cytec, Ford, SPS, or TI to bring a § 107(a) claim here and assert joint and several liability against Carpenter, Carpenter would be barred from then bringing a contribution counterclaim against them because those plaintiffs have entered into consent decrees, i.e., judicially approved settlements with the EPA. As a result, those plaintiffs would be able to recover 100 percent of their own costs against Carpenter, even though they themselves are actually responsible for, and have stipulated that they are responsible for, a significant portion of the contamination at the Boarhead Site.

As Carpenter summarized it, "[Plaintiffs who had entered into consent decrees with the EPA] would not be subject to equitable allocation. They would have no liability because they would be able to assert joint and several liability against the other parties." (Oral Argument Tr. at 9-10.) This is a

perverse result, since a primary goal of CERCLA is to make polluters pay. Indeed, the Supreme Court expressed concern about this very type of result when it recognized that, without defendants having the availability of a § 113(f) counterclaim, PRP plaintiffs might "eschew equitable apportionment ... in favor of joint and several liability under § 107(a)." *Atl .Research Corp.*, 551 U.S. at 138. The Court's explanation that the harshness of joint and several liability is mitigated by the possibility of a § 113(f) counterclaim is of no comfort to defendants like Carpenter.

Further, even under joint and several liability, a district court is not supposed to fashion an award that allows a plaintiff to recover from a defendant costs associated with the cleanup of waste that the plaintiff itself has contributed to the site. *See* THE UNIFORM COMPARATIVE FAULT ACT § 2 cmt. [hereinafter "U.C.F.A."] (indicating that even when imposing joint and several liability, courts must nevertheless "set forth ... the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault ... [so that] each party should eventually be responsible for [that amount] as a result of the rules of contribution."). That is to say, while joint and several liability allows a plaintiff to collect from a single defendant the collective liability of all defendants, it does not permit a plaintiff to recover from a defendant the costs to undo what the plaintiff itself has done. Yet this is precisely what would occur if Carpenter were barred from bringing a contribution counterclaim against the plaintiffs after the plaintiffs recovered from Carpenter under joint and several liability.

Thus, we hold that plaintiffs in the position of Cytec, Ford, SPS, and TI, who if permitted to bring a § 107(a) claim would be shielded from contribution counterclaims under § 113(f)(2), do not have any § 107(a) claims for costs incurred pursuant to consent decrees in a CERCLA suit. *Cf. Niagara Mohawk Pwr. Corp.*, 2010 WL 626064, at *8 (holding that a PRP who had settled its CERCLA liability by consent order with a state environmental agency had a § 113(f)(3)(B) claim but not a § 107(a) claim, and saying, "[c]learly, the two sections have differing restrictions and different purposes."). We need not decide the contours of the overlap postulated in *Atlantic Research* because, regardless of whether § 107(a) and § 113(f) remedies overlap at all, they cannot properly be seen to overlap here.

iii. *The District Court's Equitable Allocation Under § 113(f)*

As discussed above, Cytec, Ford, and SPS, have only § 113(f) claims for costs they incurred pursuant to the OU-1 and OU-2 Consent Decrees, and TI is in the same position with its OU-2 costs. Because the District Court resolved those claims under § 113(f) "by determining the equitable shares of [all of the parties]" (App. at 1:A61), we must now address the Court's allocation of cleanup costs.

The plaintiffs concede that they had to "put on evidence sufficient for the District Court to determine which equitable factors were appropriate and to apply those factors to the facts to determine each party's share." (Appellees' Ans. Br. at 38.) At trial, the "[p]laintiffs' theory of the case was that the volume of each party's waste disposed of at the Site

was the most appropriate equitable factor for allocation." (*Id.*) The District Court adopted that theory, holding that the "[v]olume of waste disposed at the Site is the most equitable manner of cost allocation and the Court is not hesitant to use this as its primary equitable factor." (App. at 1:A70-A71.) The Court further held that, "because culpability and cooperation are significant equitable considerations, they will be considered in the allocation equation." (App. at 1:A71.)

On appeal, Carpenter argues that the only evidence the plaintiffs introduced as to the volume of waste attributable to parties other than NRM and Carpenter consisted of the following three stipulations: (1) the June 19, 2008 stipulation among all of the parties as to the waste that DCC collected from fifteen of the defendants (not including Carpenter's, NRM's, or H&H's waste volumes); (2) the June 23, 2008 stipulation between the plaintiffs and H&H (that Carpenter did not sign) as to the volume of waste that DCC collected from plaintiffs Ford, Cytec, and SPS, and from former defendant H&H; and (3) the July 1, 2008 stipulation between the plaintiffs, Carpenter, and H&H, stipulating to the fact that the waste described in the June 23rd stipulation was CERCLA hazardous waste. Carpenter asserts that the June 23rd "stipulation is not competent evidence of the volumes of waste that DCC acquired from [the] plaintiffs and [from] H&H, because Carpenter, the only party against whom it [is] being used, did not stipulate to those volumes."[34] (Appellant's Op. Br. at 43.) Thus,

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[34]Despite the plaintiffs' argument to the contrary, Carpenter preserved this argument at trial. During trial, when

the argument runs, "if you don't have the plaintiffs' volume ... you don't know the total volume at this site. If you don't know the total volume at the site, you can't allocate between all the parties." (Oral Argument Tr. at 17.)

The plaintiffs, in response, argue that they offered sufficient evidence for the Court to determine the volume of waste that each party left at the site since they "offer[ed] into evidence the stipulations of all parties to the volumes of waste hauled by DCC from each [p]laintiff and each [d]efendant (other than Carpenter and NRM) ... ." (Appellee's Ans. Br. at 39.) The plaintiffs contend that they "thus had only to offer additional evidence sufficient for the District Court to determine the volumes of Carpenter and NRM waste that were disposed of at the Site, thereby finding all of the facts necessary to apply its primary equitable factor [i.e., waste volume]." (*Id.* at 40.)

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the plaintiffs moved to admit the June 23rd stipulation into evidence, Carpenter objected by reminding the Court that it had not joined in the stipulation. In response, the plaintiffs' counsel stated to the Court, "Your honor, we're not asking Defendant Carpenter to stipulate to any of these facts." (App. at 3:A1198.) Carpenter then responded, "That's fine so long as it is not a stipulation among all of the parties relating to the drawing of waste that was hauled by [DCC] from the same company." (*Id.*) Moreover, when the Court confirmed that it was "a stipulation of limited scope which doesn't involve [Carpenter]," Carpenter responded, "[W]e're just making a record that we do not agree or stipulate or we're not waiving any kind of objection ... ." (App. At 3:A1199.) The Court then asked the plaintiffs' counsel whether he thought Carpenter had "waived any objection," to which the plaintiffs' counsel responded, "No your Honor." (*Id.*) Finally, at oral argument before us, the plaintiffs' counsel conceded that "Carpenter chose not to agree" with the stipulation, and that Carpenter had voiced its objection at trial. (Oral Argument Tr. at 28.) The issue was thus amply preserved in the District Court.

Specifically, the plaintiffs argue that "[a]ll of these stipulations were properly admitted into the record, whether or not Carpenter was an original signatory to the June 23rd stipulation." (*Id.* at 42-43 n.14.)

Forced to confront the fact that Carpenter did not sign the June 23, 2008 stipulation, and thus never stipulated to the plaintiffs' and H&H's waste volumes, the plaintiffs advance the following theory on appeal:

> Plaintiffs and H&H stipulated on June 23, 2008 as to the nature and volume of H&H waste disposed of at the Site and the volumes of waste[] of Plaintiffs that were hauled by DCC. Then Plaintiffs, H&H, and Carpenter entered into a July 1, 2008 stipulation clarifying that the June 23rd stipulation was intended (by referencing no volumes for TI and Agere) to include the conclusion that no waste from TI and Agere was hauled by DCC, and that the wastes of the other three Plaintiffs referenced in the June 23rd stipulation ... contained CERCLA hazardous substances. *By executing the second [July 1st] stipulation, Carpenter also joined in the first one as well.*"

(*Id.* (internal citations omitted) (emphasis added).) The plaintiffs thus argue that, because the July 1st stipulation refers to the June 23rd stipulation, the

later one was "intended" to incorporate the earlier.[35] (*Id.*)

The District Court accepted that theory, stating that "[a]lthough Carpenter did not enter into [the June 23rd stipulation], it is nonetheless evidence of plaintiffs volumetric shares." (App. at 1:A71 n.43.) From the Court's opinion, it appears that the stipulations were the only evidence the Court considered with regard to the plaintiffs' and H&H's waste. All other volume evidence discussed by the District Court relates to Carpenter's or NRM's waste.

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[35]After oral argument, the plaintiffs' counsel sent a letter to our Court pursuant to Fed. R. App. P. 28(j) to address what he described as a "misstatement during oral argument ... that Appellees did not introduce evidence at trial concerning the volumes of Cytec's, SPS's, and Ford's wastes that were disposed of at the Boarhead Farms Superfund Site." Letter from Glenn A. Harris, Counsel for Plaintiffs, to Marcia M. Waldron, Clerk of the United States Court of Appeals for the Third Circuit (Dec. 18, 2009) (on file with the Court). Specifically, the plaintiffs' counsel points to several exhibits moved into evidence at trial, including purchase orders from Ford and SPS to DCC, DCC invoices to Ford and SPS, and filings made with the New Jersey Department of Environmental Protection that evidence certain volumes of Cytec's waste disposed of at the Site. (*Id.*) The plaintiffs' position is that "[t]he exhibits are in the trial record and thus can be relied upon" by our Court. (*Id.*)

However, even if we were to consider those exhibits, they are not evidence of the plaintiffs' waste volumes transported by DCC to the Boarhead Site during the relevant time period. They appear to be only a collection of invoices and purchase orders with no testimony to explain what they mean. Moreover, plaintiffs have not directed us to anything indicating that they argued at trial that those documents were evidence of their waste volumes. In fact, in the plaintiffs' reply to Carpenter's proposed findings of fact, they stated that the volume evidence for plaintiffs and H&H came from the stipulations. The District Court's opinion reveals that the Court relied solely on those stipulations to make findings of fact as to the plaintiffs' waste volumes and did not rely on the evidence discussed in the recent 28(j) letter to our Court.

iv. *The June 23rd Stipulation is Not an Admission that is Admissible Against Carpenter*

The June 23rd stipulation is the only one that included the plaintiffs' and H&H's volumes of waste, and Carpenter did not sign it. The July 1, 2008 stipulation does not incorporate by reference the June 23, 2008 stipulation, nor does it even address the volumes of waste in the earlier stipulation. It reads, in relevant part, that "[t]he waste from Plaintiff companies referenced in paragraph 5 of the June 23, 2008 [s]tipulation ... contained at least some CERCLA hazardous substances. There were no wastes hauled by [DCC] from [TI, Agere,] or their predecessors." (App. at 14:A6398.) When plaintiffs moved to admit the June 23rd stipulation at trial, Carpenter pointedly objected, as it had before, to any substantive use of the stipulation, stating "[w]e're just making a record that we do not agree or stipulate or we're not waiving any kind of objection to paragraph 5 of [the June 23rd] stipulation." (App. at 3:A1199; *see also supra* note 34.)

It would be extraordinary, in light of Carpenter's decision not to sign the June 23rd stipulation and its repeated and emphatic objections, to allow the use of the stipulation to bind it, and to permit the stipulation to become exactly what Carpenter had a right to say it was not, namely evidence against it of the volumes of waste at issue. The District Court should not have decided the plaintiffs' and H&H's volume of waste from a stipulation that Carpenter did not join. Particularly in a case like this, where the question is who bears

what share of the responsibility among those who are culpable, it is no mere technical violation of the rules of evidence to allow some parties to stipulate to their share of responsibility and then later have that stipulation be used as the basis of liability against another party. No matter how culpable a polluter may be – and in this instance, Carpenter gave the District Court ample reason to view it as highly culpable – liability can only be assigned on the basis of procedures consistent with the Due Process Clause of the Fifth Amendment of the United States Constitution and the Federal Rules of Evidence. *Cf. Dawson v. Delaware*, 503 U.S. 159, 178 (1992) ("The Due Process Clause ... traditionally has regulated questions about the improper admission of evidence.").

Before us, plaintiffs' counsel argued that the stipulation was "properly admitted into evidence" because it constitutes an admission by the plaintiffs.[36] This, of course, misapprehends the issue

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[36]The argument went as follows:

Plaintiffs' Counsel:	[T]he stipulation is admitted into evidence as proof against my client of the three entities' volumes. They could have disputed it. But its not that there's no evidence.
. . .	
The Court:	Your argument is this was, in effect, an admission.
Plaintiffs' Counsel:	Exactly.

entirely. The question isn't whether the stipulation is an admission by the plaintiffs and therefore binding as to them. The question is whether the plaintiffs' self-serving stipulation can bind Carpenter.

Taking a stipulation that a party has chosen not to sign and using it as evidence against the non-signatory violates at least the rule against hearsay. In general, hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Hearsay is not admissible unless it falls under one of the exceptions to the hearsay rule contained in the Federal Rules of Evidence. FED. R. EVID. 802. One thing which the rules define as non-hearsay is an admission by a party-opponent, defined as a "party's own statement, in either an individual or representative capacity" that is "offered against" that party. FED. R. EVID. 801(d)(2)(A). Thus, whether a statement constitutes inadmissible hearsay, or is

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. . .

Plaintiffs' Counsel:	That's exactly correct. We admitted and we stipulated with [H&H] that those are the volumes for those three companies. ... [I]t was in evidence. The judge used it. I mean he counted on it. Look on, look at the opinion. He counts those volumes against me.

(Oral Argument Tr. at 23-24.)

instead considered not to be hearsay at all because it is an admission of a party-opponent, depends on both who made the statement and whom it is being offered against. Here, while the stipulation might well be admissible non-hearsay if it were being offered against the parties who signed it, it should not have been admitted against Carpenter, since Carpenter did not sign it and no exception to the hearsay rule was advanced by the plaintiffs.[37] *Cf. Brzozowski v. Corr. Physician Servs., Inc.*, 360 F.3d 173, 179 (3d Cir. 2004) (cautioning that a plaintiff could not rely on a consent judgment against a party because that party did not sign the "stipulation ... and must be afforded the opportunity to defend itself against the claim de novo.").

Because the June 23rd stipulation should not have been admitted against Carpenter, the District Court did not rely on competent evidence as to four of the parties' waste volumes. As a result, Carpenter is correct in its assertion that the Court did not articulate an adequate basis for its decision as to the total volume of waste at the Boarhead Site. The plaintiffs concede, as they must, that it was their burden to prove each party's "fair share" or "size of the pie." (Oral Argument Tr. At 24-25.) They did not meet that burden, and, without a mention of any other evidence of the matters covered by the June 23rd stipulation, it was impossible for the District Court to perform an equitable allocation of waste

[37]Although no exception 37 to the hearsay rule is immediately apparent as being applicable here, we do not decide that none applies to the June 23rd stipulation, since that issue is not before us. We decide only that the June 23rd stipulation was not incorporated into any stipulation Carpenter did sign and that it is not admissible against Carpenter as an admission because Carpenter admitted nothing by it.

volumes among Carpenter and the other PRPs. Thus, the District Court's volume allocation constitutes an abuse of discretion and cannot stand.

v. *Other Evidence Regarding Waste Volumes*

That conclusion, however, does not end the matter. While the stipulations are inadmissible unless a hearsay exception applies, there may well be other evidence of record that could be dispositive as to plaintiffs' and H&H's waste volumes. For example, in a footnote, the District Court indicated that, because the plaintiffs stated their volumes of waste and other parties' volumes of waste in answers to contention interrogatories, and because Carpenter moved those answers into evidence, "these answers corroborate the volumes of plaintiffs' waste disposed of at the Site." (App. at 1:A71 n.43; *see also* App. at 14:A6416-6498; 6485.) Carpenter concedes that it did, indeed, introduce into evidence plaintiffs' responses to contention interrogatories. (*See* Appellant's Reply Br. at 25.) Moreover, in another part of its argument – concerning alleged error by the District Court in determining defendant NRM's waste volumes – Carpenter relied, and continues to rely, on those very same responses to argue its own point.[38] (*See* App. at 1:A39 n.21; Appellant's Reply Br. at 25.) It thus may be that the answers to contention interrogatories constitute admissions that Carpenter has adopted.[39]

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[38]*See infra* Section III.F.i.

[39]An adoptive admission refers to "evidence of other conduct of a party manifesting circumstantially the party's assent to the truth of a statement made by another." 2

The District Court, which is far more familiar with the context in which Carpenter moved to admit those responses, and the ways in which Carpenter argued their relevance, is in a better position to consider that issue. The Court may also decide that, in the unusual circumstances of this case, the record will need to be reopened to consider the equitable allocation again, and, in that context, it may review any admissible evidence as to the plaintiffs' and H&H's waste volumes. Since it may be necessary to reopen the record to address other questions, like the time period during which the EPA completed its removal action, issues of waste volumes could be addressed at the same time.

GEORGE E. DIX, ET AL., MCCORMICK ON EVIDENCE § 261 (Kenneth S. Broun, ed., 6th ed., 2009) [hereinafter "McCormick"]. Adoptive admissions in federal courts are governed by Federal Rule of Evidence 801(d)(2)(B), which provides that a statement is non-hearsay if "[t]he statement is offered against a party and is ... (B) a statement of which the party has manifested an adoption or belief in its truth." FED. R. EVID. 801(d)(2)(B). Here, Carpenter not only cited to plaintiffs' responses to contention interrogatories, but it moved those responses into evidence, relied on hem, and continues to rely on them on appeal. In other words, Carpenter urged the District Court – and now urges us – to rely on those responses as competent evidence. Carpenter thus may be viewed as showing its "assent to the truth of a statement made by another." MCCORMICK, *supra* at § 261 (explaining that "the introduction of evidence by a party" may constitute an adoptive admission "depend[ing] upon whether the particular circumstances warrant the conclusion that adoption in fact occurred"). However, we leave that determination to the District Court in the first instance.

F. *Other Contentions Regarding the District Court's Equitable Allocation*

Carpenter contends that, in addition to the improper admission of the June 23rd stipulation as volume evidence for the plaintiffs and H&H, the District Court erred in its equitable allocation analysis in three other ways. First, Carpenter argues that the Court miscalculated the volumetric share of waste that former defendant NRM sent to the Boarhead Site. Second, it argues that the District Court did not consider other defendants' culpability and lack of cooperation with the EPA to the same extent it considered Carpenter's behavior. Finally, Carpenter says that, in allocating liability, the Court should have considered the dollar amounts that the plaintiffs obtained from settling defendants, rather than those defendants' volumetric share of waste. Each of those contentions is unpersuasive.

i. *NRM's Waste*

Because the parties did not stipulate to NRM's waste, the Court heard testimony from several DCC drivers, all of whom were questioned about transporting NRM's waste to the Boarhead Site. The testimony produced the following evidence. One driver picked up waste from NRM but transported all of it to another location, not the Boarhead Site. A second driver never went to NRM to pick up waste. Two other drivers transported all NRM waste to a third location, not the Boarhead Site. June Stephens, another driver, was unclear as to whether she had driven a truck containing NRM waste, and, if she had, whether or not she had disposed of that waste at the Boarhead Site. Finally, a driver named Manfred

("Freddie") DeRewal, Jr. testified that he took six to ten tankers of NRM waste to the Boarhead site, but took the remainder of NRM's waste to other locations.

Based on that testimony, the District Court found that 32,000 gallons of NRM's waste was disposed of at the Boarhead Site. According to the Court,

> Freddie DeRewal took six to ten tankers of NRM waste to the [Site] ... . As a tanker truck held approximately 4,000 gallons of waste, DCC disposed of between 24,000 and 40,000 gallons of NRM waste at the Site ... . The Court finds that DCC disposed of 32,000 gallons of NRM waste at the Site during the Gap Period.

(App. at 1:A36.) The District Court thus chose the halfway point in the 24,000 and 40,000 gallon range.

Carpenter offers two specific contentions with regard to the NRM waste figure. First, it argues that the plaintiffs gave more definite figures in response to contention interrogatories and that the Court should have used those figures. Second, it argues that June Stephens's testimony demonstrates that she did, in fact, collect waste from NRM. As to the first point, there was nothing improper in the District Court's decision to give greater weight to witness testimony than to contention interrogatory answers. As to the second, Stephens stated explicitly that, instead of the waste she collected being NRM's, it "could have been [waste belonging to] another one

of these outfits." (App. at 15:A878.) Given the indecisiveness of Stephens's testimony, the District Court did not clearly err in interpreting her testimony the way that it did. Considering the testimony before it regarding the handling of NRM's waste, the District Court could properly determine that 32,000 gallons of waste were fairly attributable to NRM.

ii. The Culpability and Lack of Cooperation of Settling Defendants

The District Court concluded that, in addition to volume, culpability and cooperation with the government should also be considered in allocating response costs. Because "Carpenter relinquished its potent waste acids to a known polluter," (App. at 1:A72), and because Carpenter did not cooperate with the EPA, the Court decided to allocate to Carpenter an additional 17.4% of the total clean-up cost: 8.7% for working with a known polluter and 8.7% for not cooperating with the EPA. (App. at 1:A73-A74.)

Carpenter does not dispute the District Court's findings of fact concerning its repeated business dealings with DCC and related companies or the refusal to participate in cleaning up the Boarhead Site when asked to do so by the EPA. Rather, Carpenter contends on appeal that the District Court erred in ignoring the same kind of evidence with regard to other parties.

We disagree. The District Court found that Carpenter's culpability was of a different character

than any other defendant's because Carpenter had actual knowledge of DeRewal's polluting activities and yet twice chose to hire his companies to dispose of toxic waste. Carpenter introduced no evidence demonstrating that any other party acted with the same callous disregard as it did in its dealings with DeRewal's companies or with the EPA. The record reveals that Carpenter was particularly contemptuous of the law and public safety in the way it stonewalled participation in the government's cleanup efforts at the Boarhead Site. These are valid bases for viewing Carpenter as occupying a category of culpability all its own in this case. Thus, the District Court's decision to allocate an additional 17.4% of liability to Carpenter was certainly not an abuse of discretion, and the increased liability need not be revisited on remand.

iii. Settlement Amounts

The District Court chose to use the waste volumes of the settling defendants, rather than the dollar amounts that those settling defendants paid, as the primary equitable factor for its allocation. The District Court explained that it was adopting the U.C.F.A. to determine the settling parties' shares of liability. That Act states that "[t]he claim of the releasing person against other persons is reduced by the released person's equitable share of the obligation ... ." U.C.F.A. § 6. Thus, the Court concluded that, since it had used waste volumes to determine the equitable shares of the remaining PRPs, the settling defendants' liability should be "reduced by the settling party's equitable share of the liability, not by the dollar value of the settlement." (App. at 1:A71 n.43.) The District Court had in fact

held four years before trial that "the liability of the Non-Settlers [will be] determined without regard to the dollar amounts of previous settlements." (App. at 1:A85.)

Carpenter argues that the Court erred in concluding that the dollar value of the settlements were not relevant to the equitable allocation. But the District Court did not err. First, practically speaking, the settlement amounts are not of record and so the District Court could not have used them as an equitable factor. Second, as the District Court noted, the plaintiffs have every incentive to settle for as close to the settling parties' shares as possible because the plaintiffs bear the risk that those parties' shares of the cleanup costs may be greater than the settlement amount. Thus, the volume allocation likely reflects the dollar amounts. Finally, to the extent waste volumes and settlement dollars diverge, it was well within the Court's discretion to determine that the former, which are historical facts developed before litigation, are a better measure of fault than the latter, which are necessarily colored by litigation concerns. In short, while the District Court must revisit certain PRPs' volumes for the reasons described above, there was nothing wrong with its choosing to use volume, rather than the dollar value of the settlements, as the basis for allocating liability among the parties.

G. *The Pennsylvania Hazardous Sites Cleanup Act*

Lastly, Carpenter argues that plaintiffs Cytec, Ford, SPS, and TI do not have viable cost recovery claims under § 702(a) of the HSCA for the same

reasons that they do not have a § 107(a) claim under CERCLA. Neither party disputes that liability under the HSCA mirrors liability under CERCLA and that § 702(a) of the HSCA mirrors § 107(a) of CERCLA. Rather, Carpenter simply repeats its contentions as to why it believes the District Court erred in holding that Cytec, Ford, SPS, and TI have § 107(a) claims for the costs they incurred under the OU-1 and/or OU-2 Consent Decrees.

The District Court correctly held that Carpenter's liability "is neither greater nor lesser under the HSCA." (App. at 1:A76.) Indeed, the cost recovery and contribution provisions in HSCA are virtually identical to those in CERCLA. *Compare* 35 PA. STAT. ANN. §§ 6020.702(a)(3), 705(a), *with* 42 U.S.C. §§ 9607(a)(4)(B), 9613(f). Thus, on remand, the District Court should continue to address the CERCLA and HSCA issues in this case identically.[40]

IV. Conclusion

We recognize the many difficulties inherent in adjudicating this highly complex and contentious case and express appreciation for the clarity with which the District Court set forth its reasoning in support of the equitable allocation it determined.

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[40]Carpenter also argues the 40 at even if the plaintiffs could state a § 702(a) cost recovery claim under the HSCA, that claim would be barred by HSCA's statute of limitations provision, contained in 35 PA. STAT. ANN. § 6020.1114. We need not address that contention because no statute of limitations argument has been made pertaining to § 107(a). All the statute of limitations arguments that the parties have made to us pertain to § 113(f).

However, for the reasons discussed above, we must vacate the judgment and remand the case.

In summary, first, we ask the District Court to make a clear and unequivocal finding, if possible, as to when the EPA completed its removal action. To the extent the District Court decides it must reopen the record in order to make that finding, it may do so. Such a finding will allow the District Court to determine whether the EPA's December 6, 2001 filing of the suit to enforce the OU-2 Consent Decree was timely, and thus whether there is a time-bar to plaintiffs' recovering the approximately $7 million they paid to reimburse the EPA for past costs. Further, if the District Court finds that the EPA initiated "on-site physical construction" of the remedial action within three years of the completion of its removal action, it may apply the six-year statute of limitations exception contained in § 113(g)(2)(B). If the District Court finds that the EPA's December 6, 2001 suit was not time-barred, and that the plaintiffs are able to recover for past costs, the Court should make a more exact finding as the amount that the plaintiffs paid to reimburse the EPA for past costs.

Second, the District Court should permit TI (with regard to OU-1) and Agere[41] (with regard to OU-1 and OU-2) to go forward with their § 107(a) cost recovery claims to recoup costs paid as part of the shared expense of cleaning up the Boarhead Site.

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[41]Again (*see supra* 41 n. 12), we note that the District Court must determine on remand whether Agere's claims are held by it or by assignees.

Third, because we hold that Cytec, Ford, and SPS, as well as TI (with regard to OU-2), are shielded from contribution counterclaims under § 113(f)(2) and therefore do not have § 107(a) claims for costs incurred pursuant to the consent decrees, the District Court should again proceed solely under § 113(f) as to those claims.

Fourth, while proceeding under § 113(f) to allocate liability among the parties, the District Court may not consider the June 23rd stipulation as evidence against Carpenter, at least not without addressing the evidentiary problems noted herein. Beyond the stipulation, there may be evidence in the record that the District Court can rely on to perform its equitable allocation, but the District Court may also reopen the record if it deems that necessary.

For the foregoing reasons, we vacate the District Court's judgment and remand for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1814

AGERE SYSTEMS, INC.;
CYTEC INDUSTRIES, INC.; FORD MOTOR
COMPANY; SPS TECHNOLOGIES, LLC; TI
GROUP AUTOMOTIVE SYSTEMS, LLC

v.

ADVANCED ENVIRONMENTAL TECHNOLOGY
CORPORATION; ASHLAND, INC.; CARPENTER
TECHNOLOGY CORPORATION; DIAZ CHEMICAL
CORPORATION; FCG INC; HANDY & HARMAN
TUBE CO, INC.; NRM INVESTMENT COMPANY

Carpenter Technology Corporation,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-3830)
District Judge: Honorable Legrome D. Davis

Argued December 17, 2009

Before: SLOVITER, JORDAN and GREENBERG,
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on December 17, 2009. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the August 22, 2008 judgment of the District Court is hereby VACATED and the case REMANDED. All of the above in accordance with the opinion of this Court. Each party shall bear its own costs.

ATTEST:

/s/Marcia M. Waldron
Clerk

Dated: April 12, 2010

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

AGERE SYSTEMS, INC., et al.,	:	CIVIL ACTION
Plaintiffs,	:	No. 02-3830
v.	:	
ADVANCED ENVIRONMENTAL TECHNOLOGY CORPORATION., et al.,	:	August 18, 2008
Defendants.	:	

Legrome D. Davis, J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Introduction

The present action was filed under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, *42 U.S.C. § 9601, et seq.*, ("CERCLA") and the Pennsylvania Hazardous Sites Cleanup Act, *35 Pa. Cons. Stat. § 6020.101 et seq.*, ("HSCA") for the recovery of past and future costs incurred as a result of the release, and threatened release, of hazardous

substances at the Boarhead Farms Superfund Site (the "Site").

Beginning in approximately 1972, DeRewal Chemical Corporation began an extended course of illegal dumping and disposal of chemical wastes at the Site. In varying degrees, this practice continued until 1977. In the early 1980s, the Environmental Protection Agency ("EPA") began investigating the Site and in 1989 Boarhead Farms was listed on the National Priorities List. Around this time, EPA began issuing General and/or Special Notice Letters to potentially responsible parties ("PRPs") whose waste EPA believed was present at the Site. In February 2000, plaintiffs Cytec Industries, Inc. ("Cytec"), Ford Motor Company ("Ford") and SPS Technologies, LLC ("SPS") entered into a Consent Decree agreeing to perform the first operable unit of the Record of Decision ("ROD") and to reimburse EPA for its administrative and oversight costs related to this work. Plaintiffs Cytec, Ford, SPS, TI Group Automotive Systems LLC ("TI") and Agere Systems, Inc. ("Agere") then entered into an agreement with NRM Investment Company ("NRM") and Worthington Steel Company whereby these entities agreed to collectively fund and perform the first operable unit of the ROD.

Cytec, Ford, SPS, and TI thereafter entered into a second Consent Decree, agreeing to fund, implement and administer the second operable unit of the ROD, to reimburse EPA for past costs and to pay for EPA's future response costs related to the OU-2 work. Plaintiffs Cytec, Ford, SPS, TI, and Agere then entered into an agreement to collectively fund the second operable unit.

In 2002, Agere, Cytec, Ford, SPS and TI filed the present action against twenty-three defendants. When the bench trial in this matter commenced on June 23, 2008, only two defendants remained. After trial, one defendant settled, leaving Carpenter Technology Corporation ("Carpenter") as the sole active defendant.

For the reasons set forth below, judgment is entered in favor of plaintiffs and against Carpenter on all counts. Judgment is entered in favor of Carpenter and against plaintiffs on Carpenter's counter-claims for contribution.

II. Findings of Fact

Upon consideration of the Proposed Findings of Fact and Conclusion of Law (Doc. Nos 406, 407), the responses thereto, and the testimony, exhibits and arguments presented during the bench trial, the Court finds the following facts:

A. Background

Manfred DeRewal, Senior ("DeRewal Senior") was born in 1927 (P-333, Dep. of Manfred T. DeRewal, Senior [hereinafter DeRewal, Sr. Dep.] 12:3-4) and he obtained a bachelor's degree in chemistry from the University of Miami (DeRewal, Sr. Dep. 12:5-8). In the early 1960s, DeRewal Senior owned, operated and served as president of Echo, Incorporated, a pesticide manufacturing company located in Revere, Pennsylvania. (DeRewal, Sr. Dep. 15:22-16:23.) The corporation operated until 1967 when, as a consequence of its pollution practices, it was sold to

Revere Chemical Corporation, (DeRewal, Sr. Dep. 17:9-18:2), a corporate entity operated by DeRewal Senior, and of which he also served as president (P-43; P-13, page 2).[1] Revere Chemical Company was also forced to cease operations as a result of industrial waste pollution practices. (P-45; P-13, page 2; See also Noll N.T. 21:16-23:9.)

On September 2, 1969, DeRewal Senior established Boarhead Corporation for the purpose of purchasing real estate which eventually came to be known as Boarhead Farms. (J-1; DeRewal, Sr. Dep. 18:11-19:9; J-33 P 9, 10.) Boarhead Farms is located on Lonely Cottage Road in Upper Black Eddy, Pennsylvania. (J-33 P 1; DeRewal, Sr. Dep. 19:10-13;.) On December 29, 1969, DeRewal incorporated DeRewal Chemical Company, Inc. ("DCC"), whose business was to remove, transport and dispose of chemical waste generated by other companies. (J-3; J-33 P11; DeRewal, Sr. Dep. 20:24-21:12.) Manfred DeRewal, Senior was the sole owner of DCC and, as such, he controlled the day-to-day operations of the company. (DeRewal, Sr. Dep. 20:22-21:17.)

Initially, DCC disposed of the acquired waste solely at Boarhead Farms. (DeRewal, Jr. N.T. 22:17-23; 30:8-25; Bruce DeRewal N.T. 50:10-15; Barsum N.T. 73:3-22; Bean N.T. 107:5-11; Shaak N.T. 115:14-20; P-332, Stephens Dep. 28:14-24; 92:13-21; 98:15-22; 99:12-16; 170:16-171:11.) The disposal of industrial waste at Boarhead Farms continued, and in October 1973, a neighboring resident complained

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[1] DeRewal Senior denied involvement with Revere Chemical Corporation (DeRewal, Sr. Dep. 18:8-10.) However, multiple documents identify him as the President of Revere Chemical Corporation. (See P-13, page 2; P-14; P-43.)

to the Bucks County Department of Health ("BCDOH") that a stream which flowed near Boarhead Farms and onto his property was discolored and foamy. (P-9; P-13; Noll N.T. 23:10-19.) Peter Knoll, a field inspector for the BCDOH, inspected the stream, determined that it was polluted, and identified the source of the pollution as Boarhead Farms. (P-9; P-13; Noll N.T. 23:19-24:3.) The BCDOH notified the Pennsylvania Department of Environmental Resources ("DER"), and on November 2, 1973, DER issued an order to DeRewal Senior to neutralize pollutants on the property and to remove residual waste by November 9, 1973. (P-13, page 2.) DeRewal Senior failed to comply with this order. (Id.)

On December 1, 1973, DCC took possession of a rental property on Ontario Street in Philadelphia, Pennsylvania. (J-4.) The Ontario Street property consisted of a warehouse building with a floor drain, and was located two blocks from the Delaware River. (J-33 P 63; DeRewal, Jr. N.T. 37:3-38:1.) DCC began disposing of waste solutions directly into the floor drain at the Ontario Street location. (DeRewal, Jr. N.T. 38:8-20.) The Philadelphia Water Department wrote to DeRewal Senior on September 24, 1974, about the disposal of improper waste into the city sewer system from the Ontario Street property. (J-33 P 64.) On June 13, 1975, the Water Department plugged and sealed the lateral connection between the warehouse and the sewer system. (J-33 P 66-67.)

Undeterred, DeRewal established another corporation, Environmental Chemical Control, as a straw entity to rent yet another property to use as a waste disposal site for DCC. (J-5; DeRewal, Sr. Dep.

114:14-115:19; 116:20-117:19.) At this site, located in the Wissinoming Industrial Park in Philadelphia, Pennsylvania, (DeRewal, Sr. Dep. 114:19-24.), DCC disposed of waste directly down a storm drain which emptied into the Delaware River. (DeRewal, Jr. N.T. 40:7-20.) DCC eventually ceased use of this site as a result of concerns raised by the Philadelphia Water Department, Philadelphia Police Department and EPA. (DeRewal, Sr. Dep. 124:11-125-14.)

"Between February 20, 1973, and July 30, 1976, the Bucks County Department of Health filed in excess of fifteen Waste Discharge Inspection Reports regarding the Boarhead Farms Site." (J-27.) The reports chronicled improperly stored chemicals, releases of liquid chemicals, sewage sludge dumping, and burial of drums. (J-27.) On March 26, 1976, DeRewal Senior and the Boarhead Corporation were found guilty of nine violations of the Pennsylvania Clean Streams Law. (J-27, AR400018.) On October 15, 1976, an injunction issued preventing DeRewal from bringing any chemicals to the Boarhead Farms site. (J-24, page 2-3.)

B. EPA Action at Boarhead Farms

In 1984, the EPA began its Preliminary Assessment and Site Investigation of Boarhead Farms. (J-24; J-25; J-33 P 12.) The assessment and investigation confirmed the presence of a variety of contaminants (J-33 P 12) and, based on this information, on March 31, 1989 EPA placed Boarhead Farms on the National Priorities List (J-33 P 13; Vandeven N.T. 132:2-17). The EPA Remedial Investigation began on December 5, 1989, and found a multitude of hazardous substances present in the

soils, sediments and groundwater at Boarhead Farms. (J-33 P 14-16; Vandeven N.T. 137:21-138:11.) During the Remedial Investigation, EPA excavated and removed in excess of 2,500 buried drums, excavated and removed buried tanks, removed contaminated soil, constructed a preliminary groundwater treatment system and installed treatment systems on sixteen residential wells. (Vandeven N.T. 155:24-156:17; Seibel N.T. 48:8-49:5.) Additionally, several drums of radioactive materials were excavated and removed by General Ceramics, Inc., the company which had produced the waste. (J-23, page 4, AR314513.)

After the Remedial Investigation, EPA conducted a Feasibility Study and issued a Proposed Remedial Action Plan in January 1998. (J-33 at P 17-18.) Following notice and comment on the Proposed Remedial Action Plan, EPA issued a Record of Decision ("ROD") on November 18, 1998. (J-26; J-27; J-33 P 19.) The ROD identified numerous chemicals of potential concern. (J-26, Table 7.) Specifically, nine chemicals of potential concern were identified as present in the surface soil,[2] fifty-three chemicals of concern in the shallow groundwater,[3] four chemicals

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[2] These include cadmium, chromium, arsenic, beryllium, copper, thallium, zinc, bis(2-ethylhexyl)phthalate, and n-Nitrosodipropylamine. (J-26, Table 7.)

[3] These include aluminum, arsenic, barium, beryllium, cadmium, chromium, cobalt, copper, cyanide, lead, manganese, nickel, silver, vanadium, thallium, zinc, benzene, bromodichloromethane, 2-butanene, carbon tetrachloride, chlorobenzene, chloroform, 1,2-dichlorobenzene, 1,4-dichlorobenzene, 1,1-dichloroethane, 1,2 dichloroethane, 1,1-dichloroethene, 1,2-dichloroethene, 1,2-dichloropropane, ethylbenzene, methylene chloride, methyl isobutyl ketone, 1,2,2,2-tetrachloroethane, tetrachloroethene, toulene, 1,1,1-trichloroethane, 1,1,2-trichloroethane, trichlorothene, vinyl

of concern in the pond sediments,[4] and two chemicals of concern in the pond surface water.[5] (J-26, Table 7; J-33 P 20.)

The ROD also set forth a remedial strategy for the Boarhead Farms Site. (J-26.) The strategy consisted of seven components: (1) soil aeration and treatment of volatile organic compound hot spots; (2) excavation and offsite disposal of buried drums; (3) groundwater extraction, metals precipitation, and air stripping; (4) installation of additional monitoring wells; (5) implementation of institutional controls and monitoring; (6) residential water treatment; and (7) phytoremediation. (J-26; J-33 P 23.)

"Subsequent to the issuance of the ROD, EPA determined to implement the remedial action described in the ROD in two operable units." (J-33 P 23.) Operable Unit 1 ("OU-1") addressed remedial components 3, 4, 5, 6, and 7 of the ROD and included groundwater extraction, metal precipitation, air stripping, installation of additional monitoring wells, implementation of institutional controls and monitoring for OU-1, residential water treatment, and phytoremediation. (J-33 P 23; Seibel N.T. 60:3-7.) Operable Unit 2 ("OU-2") addressed remedial components 1, 2, and 5 of the ROD and included soil

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chloride, xylenes, bis(2-chloroethyl)ether, 2,4-dichlorophenol, 2,4-dinitrophenol, 2-methylnapthalene, 4-methylphenol, napthalene, nitrobenzene, 2-nitrophenol, 1,2,4-trichlorobenzene, 2,4,6-trichlorophenol, BHC-alpha, BHC-delta, and heptaclor. (J-26, Table 7.)

[4] These include arsenic, beryllium, chromium, and nickel. (J-26, Table 7.)

[5] These include chromium and manganese. (J-26, Table 7.)

aeration, treatment of volatile organic compound hot spots, excavation and disposal of drums, and implementation of institutional controls and monitoring for OU-2. (J-33 P 23.)

C. Plaintiff's Settlements with EPA

Plaintiffs Cytec, Ford and SPS are signatories to an Administrative Order for Consent for Remedial Design, EPA Docket No. III-2000-002-DC, entered in February 2000, and a Consent Decree entered by this Court on September 28, 2000. (J-33 P 24.) Pursuant to these agreements, Cytec, Ford and SPS agreed to perform the OU-1 work and to reimburse EPA for future OU-1 administrative and oversight costs. (J-33 P 24.) Cytec, Ford, SPS, TI and Agere agreed to collectively fund the OU-1 remedial design and remedial action ("RD/RA"). (J-33 P 25.) These four entities then entered into an agreement with NRM and Worthington Steel Company-Malvern ("OU-1 Group") to collectively fund and perform the OU-1 RD/RA. (J-33 P 24.)

Plaintiffs Cytec, Ford, SPS and TI are signatories to an Administrative Order for Consent for Remedial Design, EPA Docket No. III-2001-0010-DC, effective October 17, 2001, and a Consent Decree entered by this Court on March 14, 2002. (J-33 P 40.) Pursuant to these agreements, Cytec, Ford, SPS and TI agreed to perform the OU-2 RD/RA work, to reimburse EPA for $ 7,000,000 in response costs incurred and accounted for prior to July 2000, to reimburse EPA for response costs incurred after July 2000 but not yet accounted for, and to reimburse EPA for its future costs related to OU-2. (J-33 P 40.) Thereafter, Cytec, Ford, SPS, TI, and Agree ("OU-2 Group")

entered into an agreement to collectively fund and perform the OU-2 RD/RA. (J-33 P 41.)

D. OU-1 Remediation

The OU-1 group hired de maximis, inc. as the supervising contractor of the OU-1 work. (J-33 P 28; Seibel N.T. 43:7-45:2.) Geoffrey Seibel, a remedial project coordinator for de maximis, served as the project coordinator for the OU-1 work. (Seibel N.T. 43:9-45:2.) The OU-1 Group assumed responsibility for maintenance and operation of the groundwater extraction and treatment system on May 2, 2000. (J-33 P 31.) At that time, the groundwater extraction and treatment system, constructed by EPA, consisted of a 1,000 foot long trench to collect groundwater. (Seibel N.T. 52:20-53:6.) The trench contained pumps which conveyed the groundwater to a treatment building, where the water was passed through an air stripper. (Seibel N.T. 53:6-54:5.) The air stripper bubbled air through the water, causing the volatile organic compounds to exit the water into the air. (Seibel N.T. 54:6-11.) The volatile organic compounds were then vented into the air outside the building. (Seibel N.T. 54:10-16.) The groundwater extraction and treatment system did not remove inorganics or metals. (Seibel N.T. 54:24-1, 64:17-20.)

Because the third component of the ROD required precipitation of metals, the OU-1 Group retained Bigler and Associates, Inc., to reconstruct the preliminary groundwater treatment system in order to accomplish this task. (J-26; Seibel N.T. 64:15-23; 68:1-6; J-33 P 32.) A proposed modification was submitted to, and approved by, EPA. (Seibel N.T. 68:17-70:12; J-33 P 32.) In 2001 and 2002, a

comprehensive groundwater treatment plant was implemented at the Site. (Seibel N.T. 71:23-72:15; J-33 P 32.) In the new treatment system, the groundwater from the trench is pumped into a tank, which contains an air stripper and removes volatile organic compounds in much the same manner as the previous system. (Seibel N.T. 71:23-73:6; J-33 P 32.) One major difference, however, is that the volatile organic compounds are now filtered from the air, as opposed to externally vented. (Seibel N.T. 73:1-6; J-33 P 32.) Another difference is that the modified system removes metals. (Seibel N.T. 73:7-74:1; J-33 P 32.) First, the holding tank allows some of the iron in the water to precipitate out. (Seibel N.T. 73:7-13; J-33 P 32.) The water then flows from the tank to a metals treatment unit, where the remaining metals, except for manganese, are removed. (Seibel N.T. 73:21-74:1; J-33 P 32.) The metals form a sludge, which is captured and taken to an EPA-approved disposal facility. (Seibel N.T. 73:21-74:4; J-33 P 32.) The manganese is then removed by a special filter, and the water is discharged out of the treatment plant. (Seibel N.T. 74:6-14; J-33 P 32.)

Bigler and Associates was also hired by the OU-1 Group, beginning in December 2001, to continue operation and maintenance of the groundwater treatment plant. (J-33 P 33.) In May 2001, Bigler and Associates suggested conversion of the pneumatic pumps in the groundwater treatment system to electric pumps in order to decrease the system's maintenance costs.[6] (J-33 P 33.) This was approved

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[6] The pneumatic, or air-driven, pumps caused the iron in the groundwater to clog pipes and rust equipment. (Seibel N.T. 78:24- 79:17.)

by EPA and, between July and August 2001, the pneumatic pumps were replaced with electric pumps. (J-33 P 34.)

The OU-1 Group also continues monitoring the Site, as required by the ROD. A contractor was hired to monitor and maintain the residential well treatment units. (Seibel N.T. 84:4-15; J-33 P 36.) Additionally, water from the monitoring wells at the Site is regularly sampled to determine whether the level of contaminants in the groundwater is decreasing. (Seibel N.T. 80:16-83:6; J-33 P 37.) All of this work was approved by the EPA. (J-33 PP 36-37.)

Through its consultant Brown and Caldwell, the OU-1 Group conducted a study to determine whether phytoremediation, or the use of plants to remove contaminants from soil, would be effective in helping to clean up the Site. (Seibel N.T. 85:9-86:13; J-33 P 38.) In reliance on Brown and Caldwell's study, the EPA determined that phytoremediation would not be effective. (Seibel N.T. 85:9-87:5; J-33 P 38.)

The last requirement of OU-1, installation of institutional controls, was not immediately performed. Rather, EPA allowed the OU-1 institutional control requirements to be combined with the OU-2 institutional control requirements. (Seibel N.T. 83:21-84:1.)

E. OU-2 Remediation

The OU-2 Group hired Brown and Caldwell as the supervising contractor of the OU-2 work and Code Environmental Inc. to perform the OU-2 construction. (J-33 PP 43, 44.) Likewise, de maximis

and Mr. Seibel were retained as the project coordinators. (J-33 P 28.)

In performing the OU-2 remediation, the first task for the OU-2 Group was to more accurately delineate the areas previously identified by the EPA as being volatile organic compound ("VOC") hot spots. (Seibel N.T. 89:8-20; 92:21-25.) The OU-2 Group determined that the VOC hot spots were actually much smaller in area than estimated by EPA. As such, it was determined that soil aeration and treatment of the VOC hot spots was not cost-effective. (Seibel N.T. 93:14-94:2.) Instead, the soil was excavated and removed for offsite disposal, as approved by the EPA. (Seibel N.T. 93:23-94:2; 91:9-13.)

Next, the OU-2 Group investigated the twenty-seven areas of the Site identified by EPA as presenting magnetic anomalies. (Seibel N.T. 92:4-8.; 95:10-18.) The magnetic study, which was performed by Brown and Caldwell, confirmed magnetic anomalies at some of the areas previously identified by the EPA and excluded others. (Seibel N.T. 95:10-13.) Code Environmental then excavated the confirmed areas to determine the source of the magnetic anomalies. (Seibel N.T. 95:19-96:7.) Scraps of metal objects, including water heaters, wire, fragments of drums, and crushed drums, were unearthed, removed and disposed. (Seibel N.T. 96:19-98:13.) Additionally, the OU-2 Group discovered drums buried beneath the garage at the Site. (Seibel N.T. 98:16-23.) This required the group to dismantle the garage, remove the concrete floor, and excavate and remove the drums. (Seibel N.T. 98:16-23.)

On November 10, 2003, the EPA issued a preliminary closeout report, (Seibel N.T. 99:25-100-15; J-20.), the type of document typically issued by EPA when remedial construction is complete. (Seibel N.T. 100:10-101:4.) The document does not indicate, however, that maintenance and monitoring are complete. (Seibel N.T. 101:2-3.) In this particular case, the preliminary closeout report stated that the OU-1 and OU-2 remedy components were complete except for continued operation and maintenance of the groundwater extraction and treatment systems, continued maintenance of the residential filtration systems, possible modification of on-site phytoremediation and implementation of institutional controls. (J-20; Seibel N.T. 101:10-20.)

F. OU-1 and OU-2 Groups' Expenditures

The OU-1 Group established trust accounts into which OU-1 entities contribute, or have contributed, funds. (J-33 P 26.) Costs related to the OU-1 work were paid from the OU-1 trust accounts. (J-33 P 27.) Future costs related to the OU-1 Consent Decree will likewise be paid from the OU-1 trust accounts. (J-33 P 27.) In a similar fashion, the OU-2 Group established and contributed funds to the OU-2 trust accounts. (J-33 P 41.) The costs of activities carrying out the OU-2 RD/RA, and other requirements of the OU-2 Consent Decree, were paid from the OU-2 trust accounts. (J-33 P 42.)

The bills from remediation consultants and contractors are reviewed by Seibel and Coslett of de maximis. (J-33 P 50.) After reviewing the bills, they make recommendations to the OU-1 and OU-2 Groups regarding payment, and forward the bills to

two members of the Technical Committee.[7] (J-33 PP 50-51.) The two members of the Technical Committee review the bills and de maximis' recommendations and make a final determination with regard to payment. (J-33 P 51.) If approved, a payment recommendation is forwarded to Timothy Bergere, an attorney at Montgomery, McCracken & Rhoads, and common counsel to the OU-1 and OU-2 Groups with respect to the work performed at the Site. (J-33 PP 51-52.) Mr. Bergere reviews payment recommendations and, when appropriate, arranges for payments to be made from the OU-1 or OU-2 trust accounts. (J-33 P 53.)

Plaintiffs have incurred $ 13,678,378.55 in past costs as of December 31, 2007. (J-33 PP 55-59.) The costs break down as follows:

[7] The Technical Committee is comprised of representatives from the individual OU-1 and OU-2 entities. (J-33 P 29.) The Technical Committee reviews and approves payments to contractors performing work at the Site. (J-33 P 29.)

Cost Incurred	Agere	Cytec	Ford	SPS	TI	Total
OU-1 RD/RA	$540,874.34	$846,674.74	$841,152.85	$841,152.85	$286,601.22	$3,356,456.00
EPA Oversight for OU-1	$64, 439.21	$ 67,080.45	$67,080.45	$67,080.45	$22,360.15	$288,040.71
OU-2 RD/RA	$188,279.75	$530,565.73	$521,953.31	$521,953.21	$521,953.21	$2,284,705.41
EPA Oversight for OU-2	$25,428.64	$75,359.08	$75,064.54	$75,064.54	$75,064.54	$325,981.34
EPA Past Costs	$83,130.55	$1,848,871.07	$1,848,871.07	$1,848,871.07	$1,793,451.33	$7,423,195.09
Total	$902,152.49	$3,368,551.07	$3,354,122.22	$3,354,122.22	$2,699,430.55	$13,678,378.55

The costs incurred by the OU-1 and OU-2 Groups were necessary to comply with the requirements of the ROD and were consistent with the National Contingency Plan. (J-33 P 60.)

Cleanup at the Site must continue until the organic and inorganic contaminants in the groundwater reach an acceptable level as set forth by the EPA in the ROD. (J-26, page 34; Seibel N.T. 108:8-109:5.) As such, plaintiffs are incurring, and will continue to incur response costs for the indefinite future. (Seibel N.T. 108:8-109:17.)

G. TI Group Automotive Systems L.L.C.

EPA identified and notified Bundy Corporation that it was a potentially responsible party with regard to the Boarhead Farms Site. (Guerriero N.T. 24:19-23.) Sometime later, in November 1999, Bundy Corporation amended its articles of incorporation to change its name to TI Group Automotive Systems Corporation. (P-154; Guerriero N.T. 23:8-21.) At this time, TI Group, PLC, a United Kingdom corporation, was the ultimate parent of TI Group Automotive Systems Corporation. (Guerriero N.T. 27:6-8.)

In December 2000, the parent company, TI Group, PLC, merged into Smith's Industries, PLC, another United Kingdom Corporation. (Guerriero N.T. 27:13-17.) The resulting entity was called Smith's Group PLC ("Smith's"), which became the ultimate parent of TI Group Automotive Systems Corporation. (Guerriero N.T. 27:13-17.) Smith's then agreed to sell TI Group Automotive Systems Corporation to 329th Shelf Investment Company Limited. (P-157; Guerriero 27:25-29:1.) As part of the

agreement, Smith's agreed to indemnify TI Group Automotive Systems Corporation and 329th Shelf Investment Company from any liability arising out of the Boarhead Farms Site. (P-157; Guerriero N.T. 29:9-17.)

On June 8, 2001, TI Group Automotive Systems L.L.C. was incorporated as a Delaware limited liability company. (P-155.) On June 25, 2001, TI Group Automotive Systems Corporation was merged into TI Group Automotive Systems L.L.C. (P-156.)

Plaintiff TI Group Automotive Systems L.L.C. ("TI"), as a signatory to the October 17, 2001 Consent Decree and as a member of the OU-1 and OU-2 Groups, incurs obligations resulting from these agreements. (Guerriero N.T. 31:3-7.) These obligations are transmitted to Smith's which satisfies the debts in accordance with the indemnity agreement. (Guerriero N.T. 29:24-30:18; Orme N.T. 42:4-9.) Smith's caused its subsidiaries, Smiths Group Services Corporation and Smiths Group North America, Incorporated, to transfer funds to the OU-1 and OU-2 trust accounts on behalf of TI and in accordance with the indemnity agreement. (Orme N.T. 40:9-43:4; 45:17-23.) In return, and pursuant to the indemnity agreement, TI agreed with Smith's to seek to recover and to repay all sums paid by Smith's on TI's behalf. (Guerriero N.T. 31:21-32:7; Orme N.T. 4:6-11.) In fact, TI transferred a portion of its settlement proceeds emanating from this litigation to Smith's on May 10, 2007. (Guerriero N.T. 32:14-36:3; Orme N.T. 45:24-47:5.) The remainder of the proceeds are held in a trust account for fees and costs associated with the present litigation. (Guerriero N.T. 32:14-33:23.)

TI has incurred, and will incur in the future, obligations resulting from the Boarhead Farms Site. (Guerriero N.T. 30:24-31:7.) Furthermore, TI, as a signatory to the Consent Decree and as a member of the OU-1 and OU-2 Groups, is primarily liable for obligations arising from those agreements. (Guerriero N.T. 30:24-31:7.)

H. Waste Disposal at Boarhead Farms.

Manfred F. DeRewal, Junior ("Freddie DeRewal") began working for his father as an employee of DCC in 1972. (DeRewal, Jr. N.T. 19:16-25; 22:14-16.) At the time he started working, his older brother Bruce DeRewal was already an employee of DCC. (DeRewal, Jr. N.T. 20:5-7.) With the exception of four months in early 1972,[8] Bruce and Freddie worked continuously for DCC until April 1977. (DeRewal, Jr. 20:24-21:19.) John Barsum was also a DCC truck driver, and he began working for the company in 1969 or 1970. (Barsum N.T. 70:11-13; 71:14-19.) A short while later, around 1970 or 1971, June Stephens began driving a truck for DCC. (P-332, Stephens Dep. 86:20-87:13.) Ed Cypecki was also a DCC driver in the early 1970s, when Bruce DeRewal, Freddie DeRewal and John Bean were DCC truck drivers. (Bruce DeRewal N.T. 58:16-19; Bean N.T. 104:1-19; Shaak N.T. 110:2-5; DeRewal, Jr. N.T.

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[8] During this time period, Bruce and Freddie DeRewal worked for Ramos Steel in Easton, Pennsylvania. (DeRewal, Jr. N.T. 21:2-9.) Carpenter's defense focused on Bruce's hazy memory of the time period during which he worked for Ramos Steel. (Bruce DeRewal N.T. 63:3-64:8, 83:9-84:7, 85:6-87:2.) Freddie DeRewal's memory on this point was much clearer, particularly because he knew that he did not have a driver's license while he was working at Ramos Steel. (DeRewal, Jr. N.T. 21:11-19.) As such, the Court credits his testimony on this issue.

20:17-23.) Ed Cypecki was already a DCC truck driver at the time when Jeff Shaak began driving a truck for DCC. (Shack N.T. 109:22-110:5.) Rich Minthorn began working as a truck driver for DCC sometime after Jeff Shaak in the early 1970s. (Bruce DeRewal 58:16-59:4; Bean N.T. 104:1-19; Shaak N.T. 110:6-10; DeRewal, Jr. N.T. 20:8-23.) Lastly, John Bean drove a truck on a part-time basis for DCC. (Bean N.T. 100:7-10.)

At all times, DCC predominantly disposed of its waste at a single location. (DeRewal, Jr. N.T. 22:17-23, 30:19-25, 36:12-20, 38:24-39:7; Barsum N.T. 72:25-73:2; Bruce DeRewal N.T. 50:10-19; Shaak N.T. 115:14-20; 118:6-9.) A change in location typically occurred after the government became aware of DCC's illegal dumping. (DeRewal, Jr. N.T. 56:19-58:4.)

1. January 1, 1972 through December 1, 1973 ("Pre-Ontario Period").

DCC received the following waste volumes from its customers during the Pre-Ontario Period (J-34, Supplemental Facts Stipulated by All Parties; P-329, Stipulation Between Plaintiffs and Handy & Harman Tube Company, Inc. P 5; J-35 Stipulation Between Plaintiffs, Handy & Harman Tube Company, Inc., and Carpenter Technology Corporation):

Entity	Volume of Waste (gallons)
Ford	38,940
Cytec	0
SPS	21,991
TI	0

Entity	Volume of Waste (gallons)
Agere	0
Techalloy	229,067
Flexible Circuits	33,798
Etched Circuits	16,905
Plymouth Tube Company	16,104
Novartis	0
U.S. Navy	0
Bostik	0
Simon Wrecking	0
Quickline	525
Ashland Chemical Co.	0
Diaz Chemical Corp.	0
Unisys	3,465
Rohm and Haas	0
Thomas & Betts	0
Total	360,795

All of these wastes contained CERCLA hazardous substances. (J-35.)

a. Carpenter's Waste Hauled by DCC during the Pre-Ontario Period.

Carpenter's regular business practice was to meter the flow and record the volume of waste acid stored in the Carpenter waste tanks. (P-331, Adams Dep. 24:6-10.) The volume of waste deposited in the tanks was recorded in a daily log. (P-331, Adams Dep. 24:6-10.) Mr. Reger worked at Carpenter from January 1959 through 1985. (P-330, Reger Dep. 9:4-7.) Mr Reger received the log sheets contemporaneously and accurately tracked the volume of waste acid and associated removal costs. (P-330, Reger Dep. 16:9-24; P-331, Adams Dep. 24:6-

23; 26:8-11.) In accordance with these job duties, Mr. Reger created P-36 and P-37, which record the volumes of waste acid removed from Carpenter and associated costs. (P-330, Reger Dep. 14:5-25, 17:23-18:15; June 24, 2008 N.T. 6:16-7:7, 8:16-24.) P-36 and P-37 were created directly from the purchasing invoices provided by the purchasing department for the purpose of monitoring waste volumes and disposal costs. (P-330, Reger Dep. 16:9-18:15.) These charts were created and maintained in the regular course of Carpenter's business. (P-330, Reger Dep. 17:23-18:15.)

Richard Cheri worked for Carpenter from 1956 until April 1, 1999. (Cheri N.T. 104:1-4.) In 1969 Cheri was assigned to Carpenter's Purchasing Department and one of his job duties was to select and hire acid waste removal companies. (Cheri N.T. 104:5-105:18.) Carpenter used blanket purchase orders to cover DeRewal's waste hauling services, (Cheri N.T. 108:15-109:18; P-35.), and tracked and recorded the purchases on contemporaneously created documents. (Cheri N.T. 111:5-21.) Cheri created P-38, which recorded the volume of Carpenter waste acid removed by DCC, and the related costs, in accordance with his regular job duties. (Cheri N.T. 111:9-112:113:23.)

This Court finds as a fact that the Carpenter's contemporaneous business records accurately chronicle the volume of acid waste transferred to DCC. (P-36, P-37, and P-38.)

DCC obtained the following waste from Carpenter Technology during the pre-Ontario Period: during the month of June 1973, DCC hauled 143,850 gallons

of waste at $ 0.04/gallon for a cost of $ 5,754.00. (P-36, Waste Acid Removal Cost; P-37, DeRewal Chemical Co. Waste Acid Removal.)[9] In July 1973,

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[9] The photocopies of certain of the documents are difficult to decipher. However, by cross-referencing the gallons and cost on P-36, P-37, and P-38, all numbers can be discerned. The following charts summarize the relevant information in P-36, P-37, and P-38 regarding waste acid removed from Carpenter by DCC.

P-36, Waste Acid Removal Cost (DeRewal columns):

Month	Gallons	Cost
June 1973	143,850	$ 5,754.00 ($ 0.04/gallon)
July 1973	188,100	$ 7,524.00
August 1973	95,700	$ 3,828.00
September 1973	205,950	$ 8,238.00
October 1973	188,164	$ 7,526.56
November 1973	95,450	$ 3,818.00
December 1973	113,058	$ 4,462.00
Total	1,030,272	$ 41,150.56
January 1974	49,800	$ 1,992.00
February 1974	190,900	$ 7,636.00
March 1974	161,850	$ 8,092.50 ($ 0.05/gallon)
April 1974	206,550	$ 10,327.50

P-37, DeRewal Chemical Co. Waste Acid Removal:

Month	Gallons	Cost	Month Reported on Responsibility Sheet
6/13	4,350 (Summation of gallons written in margin as 30,450)	$ 1,218.00	June
"	4,350		
6/14	4,350		

"	4,350		
"	4,350		
6/15	4,350		
"	4,350		
6/16-	113,400	$ 4,536	July [incorrectly states July, reported in June on P-36]
7/1-7/15	92,400	$ 3,696	July
[indiscernible]	95,700	$ 3,828	August [incorrectly states August, reported in July on P-36]
[indiscernible]	95,700	$ 3,828	Sept. [incorrectly states Sept., reported in August on P-36]
[indiscernible]	100,050	$ 4,002	Sept.
[indiscernible]	105,900	$ 4,236	Oct. [incorrectly states Oct., reported in Sept. on P-36]
[indiscernible]	96,599	$ 3863.96	Oct.
[indiscernible]	91,565	$ 3,662.60	Nov. [incorrectly states Nov., reported in Oct. on P-36]
11/1-11/16	41,500	$ 1,660.00	Nov.
11/17-11/30	53,950	$ 2,158.00	Dec. [incorrectly states Dec., reported in Nov. on P-36]

12/2-12/14	58,100	$ 2,324.00	Jan. [incorrectly states Jan. reported in Dec. on P-36]
[indiscernible]	54,958	$ 2,198.32	Jan. [incorrectly states Jan., reported in Dec. on P-36]
1/1/74-1/15	29,050	$ 1,162.00	Jan.
[indiscernible]	20,750	$ 830.00	Feb. [incorrectly states Feb., reported in Jan. on P-36]
2/1-2/15	95,450	$ 3,818.00	Feb.
2/16-2/28	95,450	$ 3,818.00	Mar. [incorrectly states Mar., reported in Feb. on P-36]
3/1-3/15	83,000	$ 4,150.00	Mar. Price increased to .05/gal.
3/18-3/31	78,850	$ 3,942.50	Apr. [incorrectly states Apr., reported in Mar. on P-36]
4/1-4/15	103,750	$ 5,187.50	Apr.
4/16-4/30	102,800	$ 5,140.00	May [incorrectly states May, reported in Apr. on P-36]
5/1-5/15	94,500	$ 4,725.00	

P-38, DeRewal Chemical Co.:

Inv. Date	Coverage Period	Amount	Gals.
1/20/74	1/1/74 thru 1/15/74	$ 1,162.00	29,050
2/5/74	1/15/74 " 1/30/74	830.00	20,750
2/15/74	2/1/74 " 2/15/74	3818.00	95,450
2/28/74	2/16/74 " 2/28/74	3818.00	95,450
3/15/74	3/1/74 " 3/15/74	4150.00	83,000

DCC hauled 188,100 gallons of waste at $ 0.04/gallon for a cost of $ 7,524.00. (P-36, P-37.) In August 1973, DCC hauled 95,700 gallons of waste at $ 0.04/gallon for a cost of $ 3,828.00. (P-36, P-37.) In September 1973, DCC hauled 205,950 gallons of waste at $ 0.04/gallon for a cost of $ 8,238.00. (P-36, P-37.) In October 1973, DCC hauled 188,164 gallons of waste at $ 0.04/gallon for a cost of $ 7,526.56. (P-36, P-37.) In November 1973, DCC hauled 95,450 gallons of waste at $ 0.04/gallon for a cost of $ 3,818.00.

The total volume of Carpenter waste hauled by DCC during the pre-Ontario Period was 917,214 gallons at $ 0.04/gallon for a cost of $ 36,688.56. Thus, the total volume of waste picked up by DCC during the pre-Ontario Period was 1,278,009 gallons.[10]

b. Amount of Waste Disposed of at the Boarhead Farms Site During the Pre-Ontario Period.

From DCC's incorporation until December 1, 1973, when DCC obtained the Ontario Street location, its primary disposal site was Boarhead Farms. (DeRewal, Jr. N.T. 22:17-23; 30:8-25; Bruce DeRewal N.T. 50:10-15; Barsum N.T. 73:3-22; Bean N.T. 107:5-11; Shaak N.T. 115:14-20; P-332,

3/31/74	3/16/74 " 3/31/74	3942.50	78,850
4/15/74	4/1/74 "4/15/74	5187.50	103,750
4/30/74	4/16/74 " 4/30/74	5140.00	102,800
5/30/74	5/1/74 " 5/30/74	4725.00	94,500

[10] Derived by adding 360,795 gallons from plaintiffs and settled entities (excluding Handy & Harman Tube Company, whose waste will be factored in later) plus 917,214 gallons from Carpenter.

Stephens Dep. 28:14-24; 92:13-21; 98:15-22; 99:12-16; 170:16-171:11.) During this time period, identified by the parties as the Pre-Ontario Period, DCC disposed of nearly all of its acquired waste at Boarhead Farms. (DeRewal, Jr. N.T. 22:17-23; 30:8-25; Bruce DeRewal N.T. 50:10-15; Barsum N.T. 73:3-22; Bean N.T. 107:5-11; Shaak N.T. 115:14-20; P-332, Stephens Dep. 28:14-24; 92:13-21; 98:15-22; 99:12-16; 170:16-171:11.) All of DCC's truck drivers unequivocally testified that during the Pre-Ontario Period, they took the overwhelming bulk of DCC customers wastes to Boarhead Farms. Freddie DeRewal took all but three tankers of DCC's customers' bulk wastes to the Site during the Pre-Ontario Period. (DeRewal, Jr. N.T. 22:17-23; 30:8-25.) When Bruce DeRewal first began working for his father, he took all of the waste he picked up back to the Boarhead Farms Site. (Bruce DeRewal N.T. 50:10-15.) John Barsum took all but four or five loads of bulk waste to Boarhead Farms during the Pre-Ontario Period. (Barsum N.T. 73:3-22.) Barsum further testified that prior to the Ontario Street location opening, almost all of the waste hauled by DCC was transported to Boarhead Farms. (Barsum N.T. 72:25-2.) John Bean hauled every load of bulk waste he obtained from customers to Boarhead Farms. (Bean N.T. 107:5-11.) Jeffrey Shaak worked for DCC as a truck driver during two different time periods. (Shack N.T. 111:1-7.) During the initial period of employment, he transported all customer waste to Boarhead Farms. (Shaak N.T. 115:14-20.) Finally, the waste hauled by June Stephens during the Pre-Ontario Period was disposed at the Boarhead

Farms.[11] (P-332, Stephens Dep. 28:14-24; 92:13-21; 98:15-22; 99:12-16; 170:16-171:11.)

In summary, during the Pre-Ontario Period, DCC drivers hauled all but 7 or 8 tankers of waste to the Boarhead Farms for disposal. (DeRewal, Jr. N.T. 22:17-23; 30:8-25; Barsum N.T. 73:3-22.) Each tanker truck held approximately 4,000 gallons of waste. (DeRewal, Jr. N.T. 31:1-12; Mann N.T. 59:12-18; P-34, Contract between DCC and Carpenter, P 2; See also P-42, page 1 (stating that two truckloads contained approximately 8,000 gallons).) As such, all but approximately 28,000 to 32,000 gallons of waste hauled by DCC during the Pre-Ontario Period was disposed at Boarhead Farms. The total volume of waste hauled by DCC during the Pre- Ontario Period was 1,278,009 gallons. Of this, at most 32,000 gallons were disposed of elsewhere. Therefore, at least 97.5% of the waste hauled by DCC during the Pre-Ontario Period was disposed of at Boarhead Farms.[12]

Applying this percentage, the Court finds that of the 1,278,009 gallons of waste hauled from plaintiffs, settled entities[13] and Carpenter by DCC during the Pre-Ontario Period, 1,246,059 gallons were disposed

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[11] June Stephens testified that with the exception of six tankers, all of the waste she hauled for DCC was transported to Boarhead Farms. (P-332, Stephens Dep. 28:14-24; 92:13-21; 98:15-22; 99:12-16; 170:16-171:11.) Ms. Stephens stated that on six occasions, at most, she took waste to either the Ontario Street location or the Wissinoming Industrial Park location. (P-332, Stephens Dep. 28:14-24.) Because these sites were not obtained by DCC until after December 1, 1973 (J-33 PP 62, 63, 68, 69), we find as a fact that all of the pre-Ontario period waste hauled by June Stephens was disposed at Boarhead Farms.

[12] (1,278,009 - 32,000)/1,278,009 = 0.975 = 97.5%.

[13] With the exception of Handy & Harman Tube Company.

at the Boarhead Farms. Additionally, Handy & Harman Tube Company stipulated that 8,158 gallons of its waste was disposed at Boarhead Farms. (P-329, Stipulation Between Plaintiffs and Handy & Harman Tube Company, Inc. PP 1-4.) As such, the total volume of waste disposed at the Boarhead Farms Site from all entities during the Pre-Ontario Period was 1,254,217 gallons.

Because 97.5% of all waste hauled by DCC during the Pre-Ontario Period was disposed at Boarhead Farms, the following volumes of waste are attributable to plaintiffs, settled entities and Carpenter for this time period:

Entity	Volume of Waste Disposed of at Site during Pre-Ontario Period (gallons)
Carpenter	1894,284[14]
Ford	37,967
Cytec	0
SPS	21,441
TI	0
Agere	0
Techalloy	223,340
Flexible Circuits	32,953
Etched Circuits	16,482
Plymouth Tube	15,701
Company	
Novartis	0
U.S. Navy	0
Bostik	0
Simon Wrecking	0

[14] 0.975 x 917,214 gallons = 894,284 gallons

Entity	Volume of Waste Disposed of at Site during Pre-Ontario Period (gallons)
Quickline	512
Ashland Chemical	0
Company	
Diaz Chemical	0
Corporation	
Unisys	3,378
Rohm and Haas	0
Thomas & Betts	0
NRM	0
Handy & Harman	8,158
Total	1,254,217

2. December 1, 1973 through June 30 1975 ("Ontario Period").

DCC acquired the following volumes of customer waste during the Ontario Period J-34, Supplemental Facts Stipulated by All Parties; P-329, Stipulation Between Plaintiffs and Handy & Harman Tube Company, Inc. P 5; J-35 Stipulation Between Plaintiffs, Handy & Harman Tube Company, Inc., and Carpenter Technology Corporation):

Entity	Volume of Waste (gallons)
Ford	0
Cytec	193,000
SPS	24,475
TI	0
Agere	0
Techalloy	0

Entity	Volume of Waste (gallons)
Flexible Circuits	100,056
Etched Circuits	23,213
Plymouth Tube Company	11,667
Novartis	0
U.S. Navy	0
Bostik	0
Simon Wrecking	0
Quickline	2,261
Ashland Chemical Company	0
Diaz Chemical Corporation	0
Unisys	0
Rohm and Haas	0
Thomas & Betts	0
Total	354,672

All waste contained CERCLA hazardous substances. (J-35.)

a. Carpenter's Waste Hauled by DCC during the Ontario Period.

DCC received the following Carpenter waste during the Ontario period: During the month December 1973, DCC hauled 113,058 gallons of waste at $ 0.04/gallon for a cost of $ 4,462. (P-36, P-37.) During the month of January 1974, DCC hauled 49,800 gallons of waste at $ 0.04/gallon for a cost of $ 1,992.00. (P-36, P-37, P-38.) During the month of February 1974, DCC hauled 190,900 gallons of waste at $ 0.04/gallon for a cost of $ 7,636.00. (P-36, P-37, P-38.) In March 1974, DCC hauled 161,850 gallons of waste at $ 0.05/gallon for a cost of $ 8,092.50. (P-36,

P-37, P-38.) In April 1974, DCC hauled 206,550 gallons of waste at $ 0.05/gallon for a cost of $ 10,327.50. (P-36, P-37, P-38.) In May 1974, DCC hauled 94,500 gallons of waste at $ 0.05/gallon for a cost of $ 4,725.00. (P-37, P-38.)

Thus, the total volume of Carpenter waste hauled by DCC during the Ontario period was 816,658 gallons.

b. Amount of Waste Disposed of at the Boarhead Farms Site During the Ontario Period.

On November 5, 1973, DeRewal leased a one-story warehouse on Ontario Street in Philadelphia. (J-33 P 62, 63.) DCC took possession of the Ontario Street property on December 1, 1973 (J-33 P 62), and disposed of waste at the Ontario Street location by dumping it directly down the sewer (J-33 PP 64-67; DeRewal, Jr. N.T. 37:3-39:3). The Water Department wrote to DeRewal on September 24, 1974, directing him to install a limestone interceptor and a two compartment oil interceptor at the facility to prevent waste discharges into the city sewer system. (J-33 P 64.) The Water Department wrote to DeRewal again on June 2, 1975, identifying multiple deficiencies in DCC's handling of waste, and informed DCC that it planned to terminate the sewer and water services at the Ontario Street location. (J-33 P 65.) On June 2, 1975 and June 13, 1975, the Water Department plugged the lateral connection between the Ontario Street location and the city sewer system. (J-33 P 66.) On June 13, 1975, the Water Department severed and sealed the lateral connection. (J-33 P 67.)

Beginning on December 1, 1973, when DCC took possession of the Ontario Street location, and ending on June 30, 1975, shortly after the Philadelphia Water Department severed and sealed the sewer connection, DCC primarily disposed of waste at the facility on Ontario Street. (J-33 PP 62-67; DeRewal, Jr. 63:22-64:1.) However, DCC also disposed of some of its acquired waste at Boarhead Farms during the Ontario Period. June Stephens worked for DeRewal during the Ontario Period (Stephens Dep. 85:9-88:10) and, with the exception of four to six tankers, she took all of the waste she hauled to the Boarhead Farms Site. (Stephens Dep. 28:14-24; 92:16-21; 98:18-22; 99:12-16.) Additionally, John Bean worked for DCC during the Ontario Street period (Bean N.T. 101:17-102:2) and all of the waste he hauled went to the Boarhead Farms Site. (Bean N.T. 105:23-106:2; 106:24-11.)

Moreover, observations by the Bucks County Department of Health ("BCDOH") indicate that waste was being disposed at Boarhead Farms during the Ontario Period. On April 25, 1974, the BCDOH observed a discharge of waste from the Boarhead Farms Site which had caused a downstream creek to foam. (P-20.) Additionally, BCDOH observed heavy orange sediment downstream from the swamp on the Boarhead Farms property, and concluded that the swamp was untreated and saturated with waste. (P-20.) Lastly, BCDOH observed an unknown orange substance in a puddle near a storage area on the Site. (P-20.) On February 26, 1975, BCDOH observed that the collection pit on the Site was overflowing, and that there were breaches in the collection trench which allowed waste to flow toward the creek downstream from the Site. (P-22.) On this same day,

BCDOH observed trailers containing barrels of acid and dry chemicals parked at the Site. (P-22.)

Lastly, during the Ontario period Bruce DeRewal drove between Ontario Street and Carpenter roughly four times per day, essentially living out of the truck. (Bruce DeRewal N.T. 56:13-24.) Once a week, however, Bruce DeRewal would take the tanker of Carpenter waste back to the farm for disposal so that he could get a change of clothes and money for fuel. (Bruce DeRewal N.T. 56:13-24.) During the Ontario Period, DCC hauled Carpenter's waste from December 1, 1973 through May 30, 1974. (P-36, P-37, P-38.) Because this time period consisted of 26 weeks, and Bruce DeRewal disposed of Carpenter's waste once a week at the Boarhead Farms Site, approximately 26 tankers of Carpenter's Ontario period waste was disposed at Boarhead Farms. As a tanker holds 4,000 gallons of waste, (DeRewal, Jr. N.T. 31:1-12; Mann N.T. 59:12-18; P-34, Contract between DCC and Carpenter, P 2; See also P-42, page 1 (stating that two truckloads was approximately 8,000 gallons).), during the Ontario period, 104,000 gallons of the 816,658 gallons of Carpenter's waste hauled by DCC was transported to Boarhead Farms.[15] In other words, approximately 13% of Carpenter's waste was disposed at Boarhead Farms.[16]

Although the evidence only specifically identifies Carpenter waste as having been disposed at

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[15] 4,000 gallons x 26 weeks = 104,000 gallons during the 26 week period.

[16] 104,000 gallons/816,658 gallons = 13%

Boarhead Farms during the Ontario period, it is reasonable to conclude from the observations of the BCDOH employees that other waste was also being disposed at Boarhead Farms during this period. (See P-20; P-22 (observing orange sediment, orange puddle, and waste contained in drums at the Site during the Ontario Period).) As a result, it is fair to conclude that Carpenter waste was not treated differently than the waste of other DCC customers. Accordingly, we find that 13% of all waste hauled by DCC during the Ontario period was disposed at Boarhead Farms. Thus, of the 354,672 gallons of waste DCC picked up from the plaintiffs and settled parties during the Ontario period, thirteen percent, or 46,107 gallons, of this waste was disposed at Boarhead Farms Site. Therefore, the total volume of waste disposed at Boarhead Farms from plaintiffs, settled parties and Carpenter was 150,107 gallons.[17]

Because 13% of all waste hauled by DCC during the Ontario Period was disposed at Boarhead Farms, the following volumes of waste are attributable to plaintiffs, settled entities, and Carpenter for this time period:

Entity	Volume of Waste Disposed of at Site During Ontario Period (gallons)
Carpenter	104,000
Ford	0
Cytec	25,090
SPS	3,182
TI	0

[17] 104,000 gallons of Carpenter's waste + 46,107 gallons of plaintiffs' and settled parties' waste = 150,107 gallons.

Entity	Volume of Waste Disposed of at Site During Ontario Period (gallons)
Agere	0
Techalloy	0
Flexible Circuits	13,007
Etched Circuits	3,018
Plymouth Tube Company	1,517
Novartis	0
U.S. Navy	0
Bostik	0
Simon Wrecking	0
Quickline	2,261
Ashland Chemical Company	0
Diaz Chemical Corporation	0
Unisys	0
Rohm and Haas	0
Thomas & Betts	0
NRM	0
Handy & Harman	0
Total	150,107

3. July 1, 1975 through September 1, 1975 ("Gap Period")

For a two month period after the Water Department disconnected the Ontario Street location from the sewer system, DCC lacked regular access to a disposal location other than Boarhead Farms. (DeRewal, Jr. 57:17-58:8.) The parties stipulated to

the volumes of waste picked up by DCC from July 1, 1975 through June 6, 1976, an eleven month period. (J-34.) The Court concludes that the volume of waste picked up by DCC over this eleven month period was constant and that a monthly average is reliable. The volumes of waste picked up by DCC from plaintiffs and the settled parties during the Gap Period are calculated by taking the monthly average from the stipulated volumes of waste hauled by DCC between July 1, 1975 and June 1, 1976 and then multiplying the average by two.

DCC picked up the following volumes of waste from plaintiffs and settled parties during the Gap Period (J-34, Supplemental Facts Stipulated by All Parties; P-329, Stipulation Between Plaintiffs and Handy & Harman Tube Company, Inc. P 5; J-35 Stipulation Between Plaintiffs, Handy & Harman Tube Company, Inc., and Carpenter Technology Corporation):

Entity	Volume of Waste 7/1/75 - 6/1/76 (gallons)	Monthly Average	Volume of Waste Hauled by DCC during Gap Period
Ford	0	0	0
Cytec	0	0	0
SPS	12,540	1,140	2,280
TI	0	0	0
Agere	0	0	0
Techalloy	0	0	0
Flexible Circuits	15,792	1,436	2,871
Etched	13,885	1,262	2,525

Entity	Volume of Waste 7/1/75 - 6/1/76 (gallons)	Monthly Average	Volume of Waste Hauled by DCC during Gap Period
Circuits			
Plymouth Tube Co.	4,465	406	812
Novartis	0	0	0
U.S. Navy	0	0	0
Bostik	0	0	0
Simon Wrecking	0	0	0
Quickline	0	0	0
Ashland Chemical Company	0	0	0
Diaz Chemical Corp.	0	0	0
Unisys	0	0	0
Rohm and Haas	0	0	0
Thomas & Betts	0	0	0
Total	46,682	4,244	8,488

All wastes contained CERCLA hazardous substances. (J-35.)

During the Gap Period, Freddie DeRewal transported almost all of the waste he acquired from DCC customers to Boarhead Farms. (DeRewal, Jr. N.T. 38:24-39:7.) June Stephens worked for DeRewal

during the Gap Period (Stephens Dep. 85:9-88:10) and all of the waste she hauled during the Gap Period went to Boarhead Farms.[18] (Stephens Dep. 28:14-24; 92:16-21; 98:18-22; 99:12-16.) Additionally, John Bean worked for DCC during the Gap Period (Bean N.T. 101:17-102:2) and all of the waste he hauled was transported to Boarhead Farms. (Bean N.T. 105:23-106:2; 106:24-11.)

From the drivers' testimony, the Court concludes that 100% of the waste picked up by DCC from its customers during the Gap Period was disposed at Boarhead Farms.[19] Thus, all of the 8,488 gallons of customer waste received by DCC during this period was disposed at the Site.

In addition, DCC also hauled NRM waste during the Gap Period. (DeRewal, Jr. N.T. 41:11-25.) Freddie DeRewal took six to ten tankers of NRM waste to the Boarhead Farms Site during the Gap Period. (DeRewal, Jr. N.T. 42:4-7.) As a tanker truck

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[18] The four to six tankers of waste June Stephens took to Philadelphia went to the Ontario or Wissinoming facilities. (Stephens Dep. 28:14-24; 92:16-21; 98:18-22; 99:12-16.) Neither of these locations were available during the Gap Period, and therefore all of the waste June Stephens hauled during this period went to Boarhead Farms.

[19] Although it is likely that, during the Gap Period, DCC disposed of some waste at locations other than Boarhead Farms, there is no specific evidence of any particular party's waste or any specific volume of waste going elsewhere. Morever, the drivers testimony supports the inference that nearly all of the waste hauled by DCC during the two-month Gap Period went to Boarhead Farms. Because it is most fair to Carpenter, Court concludes that 100% of the waste hauled during the Gap Period went to Boarhead Farms, and rejects plaintiffs' proposed finding that 65% of the waste hauled by DCC during this period went to the Site.

held approximately 4,000 gallons of waste, (DeRewal, Jr. N.T. 31:1-12; Mann N.T. 59:12-18; P-34, Contract between DCC and Carpenter, P 2; See also P-42, page 1 (stating that two truckloads was approximately 8,000 gallons).), DCC disposed of between 24,000 and 40,000 gallons of NRM waste at the Site during the Gap Period. The Court finds that DCC disposed of 32,000 gallons of NRM waste at the Site during the Gap Period.

Thus the total volume of waste DCC disposed at the Boarhead Farms Site during the Gap Period was 40,488 gallons.[20] Because 100% of all waste hauled by DCC during the Gap Period was disposed at Boarhead Farms, the following volumes of waste are attributable to plaintiffs, settled entities and Carpenter for this time period:

Entity	Volume of Waste Disposed of at Site During Gap Period (gallons)
Carpenter	0
Ford	0
Cytec	0
SPS	2,280
TI	0
Agere	0
Techalloy	0
Flexible Circuits	2,871
Etched Circuits	2,525
Plymouth Tube Co.	812
Novartis	0

[20] 8,488 gallons (plaintiffs and settled parties) + 32,000 gallons (NRM) = 40,488 gallons

Entity	Volume of Waste Disposed of at Site During Gap Period (gallons)
U.S. Navy	0
Bostik	0
Simon Wrecking	0
Quickline	0
Ashland Chemical Company	0
Diaz Chemical Corporation	0
Unisys	0
Rohm and Haas	0
NRM	32,000
Handy & Harman	0
Thomas & Betts	0
Total	40,488

4. September 1, 1975 through March 29, 1977 ("Wissinoming Period").

On October 18, 1976, Manfred DeRewal, Senior incorporated Environmental Chemical Control ("ECC"). (J-5; J-33 P 68.) ECC entered into a lease dated May 6, 1976, with Wissinoming Industrial Park for the premises located on Comly Street in Philadelphia. Although the term of the lease ran from June 1, 1976 through May 31, 1977 (J-33 P 69), DCC obtained access to the Wissinoming facility several months earlier, on approximately September 1, 1975 (DeRewal, Jr. N.T. 39:1-3, 58:1-8). Freddie DeRewal testified that, about two months after the Ontario Street facility was shut down, DCC began disposing of waste at the Wissinoming Industrial Park facility. (DeRewal, Jr. N.T. 58:1-8.) At the

Wissinoming facility, DCC disposed of customer waste by dumping it down a drain, which emptied into the Delaware River. (DeRewal, Jr. N.T. 40:7-20.)

The parties stipulated to the volumes of waste picked up by DCC from July 1, 1975, through June 6, 1976, an eleven month period spanning both the Gap Period and part of the Wissinoming Period. (J-34.) The Court finds that the volume of waste picked up by DCC over this eleven month period was constant and that a monthly average is reliable. The volumes of waste picked up by DCC from plaintiffs and settled parties during the Wissinoming Period are calculated by taking the monthly average of the stipulated volumes hauled by DCC between July 1, 1975, and June 1, 1976, multiplying it by nine, and then adding the stipulated volume of waste hauled by DCC between June 1, 1976, and March 30, 1977.

DCC picked up the following volumes of waste from plaintiffs and settled parties during the Wissinoming Period (J-34, Supplemental Facts Stipulated by All Parties; P-329, Stipulation Between Plaintiffs and Handy & Harman Tube Company, Inc. P 5; J-35 Stipulation Between Plaintiffs, Handy & Harman Tube Company, Inc., and Carpenter Technology Corporation):

Entity	Volume of Waste 7/1/75 - 6/1/76 (gallons)	Monthly Average	Volume of Waste 9/1/75- 6/1/76	Volume of Waste 6/1/76- 3/30/77	Volume of Waste 9/1/75 - 3/30/77
Ford	0	0	0	0	0
Cytec	0	0	0	116,000	116,000
SPS	12,540	1,140	10,260	12,431	22,691
TI	0	0	0	0	0
Agere	0	0	0	0	0
Techalloy	0	0	0	0	0
Flexible Circuits	15,792	1,436	12,921	8,458	21,379
Etched Circuits	13,885	1,262	11,360	14,268	25,628
Plymouth Tube Company	4,465	406	3,653	1,165	4,818
Novartis	0	0	0	53,800	53,800
U.S. Navy	0	0	0	0	0

Entity	Volume of Waste 7/1/75 - 6/1/76 (gallons)	Monthly Average	Volume of Waste 9/1/75- 6/1/76	Volume of Waste 6/1/76- 3/30/77	Volume of Waste 9/1/75 - 3/30/77
Bostik	0	0	0	9,000	9,000
Simon Wrecking	0	0	0	0	0
Quickline	0	0	0	0	0
Ashland	0	0	0	555,655	555,655[21]

[21] In its Reply to Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Doc. No. 407), Carpenter argues that plaintiffs' evidence of the volume of waste disposed at the Site by Ashland, Diaz, and NRM should be disregarded because this evidence conflicts with plaintiffs' answers to defendants' contention interrogatories. Initially, the Court notes that Carpenter stipulated to the volume of waste DCC received from these entities. J-34.) Additionally, answers to interrogatories, while competent evidence, are not binding. *Fidelity & Deposit Co. of Maryland v. Hudson United Bank, 653 F.2d 766, 777 (3d Cir. 1981).* Lastly, Ashland and Diaz' shares are the same in both plaintiffs' proposed findings and interrogatory answers. The purported difference is that, although plaintiffs originally believed that they could prove 25% of the nitrating acid waste went to Boarhead Farms during the Wissinoming Period, at trial their evidence only demonstrated that 15% of the waste went to Boarhead Farms. As such, their proposed findings correlated to the evidence presented at trial. With respect to NRM's waste, again, plaintiffs conformed their proposed findings to the proofs

Entity	Volume of Waste 7/1/75 - 6/1/76 (gallons)	Monthly Average	Volume of Waste 9/1/75- 6/1/76	Volume of Waste 6/1/76- 3/30/77	Volume of Waste 9/1/75 - 3/30/77
Chemical Company					
Diaz Chemical Corp.	0	0	0	173,100	173,100
Unisys	0	0	0	0	0
Rohm and Haas	0	0	0	0	0
Thomas & Betts	0	0	0	0	0
Total	46,682	4,244	38,194	943,877	982,071

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actually offered at trial. For all of these reasons, Carpenter's argument regarding plaintiffs' answers to interrogatories is of no moment.

All wastes contained CERCLA hazardous substances. (J-35.)

Additionally, although the parties did not stipulate to a volume of waste for NRM, Freddie DeRewal testified that all of the waste he picked up from NRM during the Wissinoming Period went to the Wissinoming facility. (DeRewal, Jr. N.T. 42:1-3.) Jeff Shaak also picked up waste from NRM. (Shaak N.T. 116:20-23.) He, as well, transported all NRM waste to the Wissinoming location. (Shaak N.T. 116:24-117:11.) There is no specific evidence that DCC transported a particular volume of NRM waste to Boarhead Farms during the Wissinoming period.

It has been established as a fact, however, that although most waste hauled by DCC went to the Wissinoming location during the Wissinoming Period, DCC still periodically used the Boarhead Farms Site for waste disposal. June Stephens, who worked as a DCC driver during the Wissinoming Period (Stephens Dep. 85:9-88:10), took all of the waste she hauled to the Boarhead Farms Site. with the exception of four to six tankers. (Stephens Dep. 28:14-24; 92:16-21; 98:18-22; 99:12-16.) Additionally, John Bean worked for DCC during the Wissinoming Period (Bean N.T. 101:17-103:18) and all of the waste he transported during this time period was disposed at the Boarhead Farms Site. (Bean N.T. 105:23-106:2; 106:24-11.)

In reliance on this testimony, we conclude that 15% of the waste hauled by DCC during the Wissinoming Period was disposed at the Boarhead Farms Site. Thus, of the 982,071 gallons of waste DCC picked up from its customers during the

Wissinoming Period, 147,311 gallons were disposed of at the Site.

Because 15% of all waste hauled by DCC during the Wissinoming Period was disposed at Boarhead Farms, the following volumes of waste are attributable to plaintiffs, settled entities, and Carpenter for this time period:

Entity	Volume of Waste Disposed of at Site During Wissinoming Period (gallons)
Carpenter	0
Ford	0
Cytec	17,400
SPS	3,404
TI	0
Agere	0
Techalloy	0
Flexible Circuits	3,207
Etched Circuits	3,844
Plymouth Tube Company	723
Novartis	8,070
U.S. Navy	0
Bostik	1,350
Simon Wrecking	0
Quickline	0
Ashland Chemical Company	83,348
Diaz Chemical Corporation	25,965
Unisys	0
Rohm and Haas	0

Entity	Volume of Waste Disposed of at Site During Wissinoming Period (gallons)
Thomas & Betts	0
NRM	0
Handy & Harman	0
Total	147,311

5. Unknown Periods

DCC picked up 2,390 gallons of waste from the United States Navy during an unknown time period. J-34.) DCC picked up 3,025 gallons of waste from Simon Wrecking during an unknown time period.[22] J-34.)

There is no evidence of when DCC received this waste or where it was disposed. However, in fairness to Carpenter, the Court concludes that this waste had the same likelihood of reaching the Site as any other waste. Therefore, based on the percentage of waste disposed of at Boarhead Farms during the Pre-Ontario, Ontario, Gap, and Wissinoming time periods (see Sections III.H.1 through III.H.4 supra), the Court infers that 47% of the waste hauled by DCC during an unknown time period was disposed of at the Boarhead Farms Site.[23]

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[22] DCC also picked up 36,500 gallons of waste from Knoll International, Inc. ("Knoll") during an unknown period. Because Knoll's share is orphaned, the volume of waste attributed to it will not be included in the calculation. (See Section III.B. infra.)

[23] There is no record evidence that the waste disposed of during an "unknown" period was more or less likely have been hauled during any specific time period. Thus, the Court finds that the waste hauled by DCC during an "unknown" period was equally likely to have been picked up during the Pre-Ontario Period,

The waste disposed of at the Site, attributable to the United States Navy is 1,123 gallons. The waste disposed of at the Site, attributable to Simon Wrecking is 1,422 gallons. Thus, of the 5,415 gallons of waste picked up by DCC during an unknown time period, 2,545 gallons were disposed at Boarhead Farms.

I. Volumetric Shares of Carpenter, Plaintiffs, and Settled Parties.

The total amount of waste disposed of at the Site during all time periods, including unknown time periods, was 1,594,668 gallons.[24] Thus, Carpenter, plaintiffs and settled parties have the following volumetric shares:

Entity	Volume Disposed of at Site	Percentage
Carpenter	998,284	62.60%
Ford	37,967	2.38%
Cytec	42,490	2.66%
SPS	30,307	1.90%
TI	0	0.00%
Agere	0	0.00%
Techalloy	223,340	14.01%
Flexible	52,038	13.26%

Ontario Period, Gap Period, or Wissinoming Period. As such, the likelihood that waste hauled during an unknown period was disposed of at the Site is calculated as follows: [(97.5% x 23 months) + (13% x 19 months) + (100% x 2 months) + (15% x 19 months)] / 63 total months = 47%

[24] 1,254,217 (Pre-Ontario Period) + 150,107 (Ontario Period) + 40,488 (Gap Period) + 147,311 (Wissinoming Period) + 2,545 (Unknown Periods) = 1,594,668 gallons

Entity	Volume Disposed of at Site	Percentage
Circuits		
Etched Circuits	25,869	1.62%
Plymouth Tube Co.	18,753	1.18%
Novartis	8,070	0.51%
U.S. Navy	1,1230	0.07%
Bostik	1,350	0.08%
Simon Wrecking	1,422	0.09%
Quickline	806	0.05%
Ashland Chemical Company	83,348	5.23%
Diaz Chemical Corp.	25,965	1.63%
Unisys	3,378	0.21%
Rohm and Haas	0	0.00%
Thomas & Betts	0	0.00%
NRM	32,000	2.01%
Handy & Harman	8,158	0.51%
Total	1,594,668	100.00%

J. Other Disposal Sites

Virtually all of the customers' waste acquired by DCC was disposed at Boarhead Farms, Ontario Street and the Wissinoming facility. (DeRewal, Jr. N.T. 22:17-23, 30:8-25, 38:24-39:7, 58:1-8, 63:22-64:1; Bruce DeRewal N.T. 50:10-15; Barsum N.T. 73:3-22; Bean N.T. 105:23-106:2, 106:24-107:11; Shaak N.T. 115:14-20; P-332, Stephens Dep. 28:14-24, 92:13-21, 98:15-22, 99:12-16, 170:16-171:11.) Bruce DeRewal never took any DCC customer waste to any location other than the Boarhead Farms Site, the Ontario Street location or the Wissinoming facility. (Bruce DeRewal N.T. 60:12-16.) Jeff Shaak never took DCC customer waste to any location other than the Site or Wissinoming. (Shack N.T. 118:2-14.) John Bean never took any DCC customer waste to any location other than Boarhead Farms. (Bean N.T. 107:5-11.) June Stephens only ever took DCC customer wastes to Boarhead Farms, Ontario Street and the Wissinoming facility. (P-332, Stephens Dep. 24:1-29:5, 170:1-171:11.)

The Revere Chemical Site, operated by DeRewal Senior in the 1960s, was shut down by the Commonwealth of Pennsylvania, and Pennsylvania Department of Environmental Protection clean up efforts began in 1971. (Noll N.T. 21:19-22:12.) Beginning in 1971, Peter Noll, an employee of the Bucks County Department of Health inspected the Revere Chemical site once a month. (Noll N.T. 22:14-16.) Noll did not observe any evidence of waste disposal at the Revere Chemical site. (Noll N.T. 22:17-23:9.)

DCC never utilized a landfill in or near Reading, Pennsylvania to dispose of Carpenter waste. No DCC driver ever testified to utilizing such a landfill. (DeRewal, Jr. N.T. 34:7-12; 36:12-20; Bruce DeRewal N.T. 58:8-11; P-332, Stephens Dep. 98:15-19.) Manfred DeRewal's deposition testimony that some unidentified DCC customer waste was transported to a landfill on Route 322, is not accepted as credible. (DeRewal, Sr. Dep. 89:20-90:25, 295:296:8.)

K. Orphaned Parties

The following entities lack available assets and are financially unable to participate in the cleanup of the Site: Manfred T. DeRewal, Senior, Boarhead Corporation, DCC, Environmental Chemical Corporation, Diaz Chemical Corporation, Drake Chemicals, Inc., Enviratec, Inc., Globe Disposal Co., Inc., Haven Chemical, Inc., Merit Metal Product Corporation, Sitkin Smelting & Refining, Inc., and Trace International, Inc. (Dovell N.T. 148:2-166:23.)

L. Nature of Carpenter's Waste Acid.

All of Carpenter's concentrated waste acids, products of the pickling process,[25] were stored in acid

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[25] "Pickling" metal refers to a process where acid is used to remove rust and other impurities from metal. (Adams N.T. 51:11-15; Mann N.T. 7:8-14.) At Carpenter, steel or alloy products were first dipped into salt baths for descaling. (Adams N.T. 50:25-51:10.) After the metals were quenched in water, they were then dipped in a bath of acid. (Adams N.T. 51:8-15; Mann N.T. 7:15-17, 8:16-19.) The type of acid and the duration of the acid bath were dependent upon the characteristics of the metal to be cleansed. (Adams N.T. 51:11-15.) Following the acid bath, the metals were rinsed with water and further processed. (Adams N.T. 51:16-18, 56:6-11; Mann N.T. 8:8-15, 9:4-10.)

holding tanks and subject to regular chemical analysis as a business practice.[26] (P-331, Adams Dep. 56:15-57:1; Mann N.T. 11:6-12:25.) Carpenter employees regularly removed samples from the acid tanks and chemical tests were conducted upon those samples. (Polinko N.T. 65:22-66:6.) Test results were recorded on "Analysis Request - Waste Acids" forms. (P-46; Polinko N.T. 66:10-15.) The tests were limited to certain constituent substances; however, the waste acids did contain other metals for which no analytical tests were performed. (Polinko N.T. 75:9-76:6.) The composition of the waste acids varied only slightly over time. (Polinko N.T. 82:22-84:3:19; Mann N.T. 24:9-25.)

From 1973 until June 1974, on average Carpenter's waste hydrochloric acid pickle liquor consisted of (by weight) hydrochloric acid (17%), hydrofluoric acid (0.2%), nitric acid (0.8%), sulfuric acid (0.9%), iron (3.4%), nickel (1.1%), chromium (0.5%), cobalt (0.05%), copper (0.02%), magnesium (0.007%), manganese (0.03%), phosphorus (less than 0.01 %), titanium (0.003%), and vanadium (0.02%). (P-40; Mann N.T. 23:16-19, 25:4-27:24; Exner N.T. 98:5-11) Several of the metals contained in Carpenter's waste acid were found by the EPA at the Boarhead Farms Site. (Compare J-26, Table 7 with P-40; Mann N.T. 29:6-32:19.)

The pH of the Carpenter's waste acid pickle liquor was less than zero.[27] (P-40; Mann N.T. 28:25-29:5;

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[26] Indeed, Carpenter advised the waste acid hauling vendors of the chemical composition of the waste to be hauled. (Mann N.T. 12:12-25; Polinko N.T. 65:18-21.)

[27] The pH scale is a measure of acidity. (Exner N.T. 102:5-6.) Living systems and water are at a pH of approximately 7, which

Exner N.T. 101:25-102:9; Brown N.T. 57:23-25, 59:15-16.) Carpenter's pickle liquor was a particularly strong acid because the production workers were paid "piecemeal" and would replace the acid baths before they were fully "spent" since fresh acid accelerated the steel cleansing process. (Mann N.T. 58:1-59:8.) The waste hydrochloric acid was a very strong acid.[28] (Mann N.T. 28:25-29:5; Exner N.T. 101:25-102:9; Brown N.T. 59:15-21.)

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is neutral. (Exner N.T. 102:6-7; Brown N.T. 47:24-48:2.) The pH scale runs from zero to fourteen, each unit being a factor of ten. (Exner N.T. 102:6-8.) Materials with a low pH, such as zero are potent acids. (Exner N.T. 8-9; Brown N.T. 48:15-18, 59:15-16.)

[28] Although Carpenter's expert, Dr. Franklin Lee Mink, described Carpenter's waste pickle liquor as "rusty water" (Mink N.T. 219:18-20), this opinion is untrustworthy and rejected in total. First, multiple witnesses, including a former Carpenter employee, testified that the waste pickle liquor had a pH less than zero, indicating that the spent pickle liquor was a very strong acid. (Exner N.T. 102:4-19; Brown N.T. 57:21-59:16; Mann 28:25-5, 58:9-14.)

Furthermore, the Court rejects Dr. Mink's testimony in its entirety due to serious concerns regarding his veracity. Initially, the Court notes that Dr. Mink's CV contained many errors which were, at best, careless mistakes and, at worst, pure fabrications. Although Dr. Mink's CV stated that he possessed an Associate's degree in "Environmental Toxicology", the Associate's degree actually awarded to him was in "Environmental Science" or "Environmental Technology". (Mink N.T. 195:17-25; C-19.) In fact, Dr. Mink could not remember the precise degree. (Mink N.T. 195:22-23.) Additionally, Dr. Mink's CV stated that he had a Bachelor of Science in Biochemistry and a minor in Biology. (Mink N.T. 196:1-197:25; C-19.) However, Dr. Mink actually majored in Biology and minored in Chemistry. (Mink N.T. 196:14-197:15.) Although Dr. Mink claims that this is the equivalent of a degree in Biochemistry, he had no explanation as to why his minor changed from chemistry to biology. (Mink N.T. 196:1-197:25.)

Dr. Mink's CV stated that from 1977 until 1983 he was the Section Chief of the United States EPA, Chemical Support Branch, Health Effects Research Laboratory. (Mink N.T. 198:5-21; C-19.) In fact, Dr. Mink was only the Section Chief from 1980 to 1983. (Mink N.T. 198:19-21.) Again, on his CV, Dr. Mink states that he was the acting director of the EPA Environmental Criterion Assessment Office from 1983 through

In conclusion, the Court finds as a fact that Carpenter's pickle liquor was a potent acid containing a multitude of metals. (Brown N.T. 59:15-21.)

M. Carpenter's Knowledge and Continuing Business Relationship with Manfred DeRewal, Senior, a Known Polluter.

1988. (Mink N.T. 199:5-11; C-19.) In fact, Dr. Mink was the acting director from 1986 through 1988. (Mink N.T. 199:9-11.) On the second paragraph of the third page of his CV, Dr. Mink states that while working at Environ, he "oversaw a combined budget of $ 400 million and managed over 400 professionals." (C-19; Mink N.T. 200:5-9.) Dr. Mink actually oversaw a budget of $ 40 million. (Mink N.T. 200:5-18.) On the fourth page of his CV, Dr. Mink stated that he taught at "Oakland University - SOM." (C-19, page 4; Mink N.T. 200:19-22.) Dr. Mink stated at his deposition that "SOM" meant "School of Medicine." (Mink N.T. 200:23-25.) However, as of Dr. Mink's deposition taken in 2007, Oakland University did not have a school of medicine. (Mink N.T. 201:1-11. But see The News @ OU, OU, Beaumont Hospitals announce plans for medical school, April 5, 2007, http://www4.oakland.edu/view_news.aspx?sid=148&id=3803 (last visited July 30, 2008) (stating Oakland University intends to open a medical school in 2010).) On the fourth page of Dr. Mink's CV, under "National/International Honors/Awards", Mink states he served on the United States EPA Advisory Board from 1978-1982 and from 2005-2007. (Mink N.T. 201:25-202:5; C-19, page 4.) In fact, Dr. Mink served on a panel, and not on the Science Advisory Board. (Mink N.T. 202:6-22.) Although Dr. Mink testified that the panel and the board were equivalent, one is a paid position and one is not. (Mink N.T. 202:9-21.) Moreover, Dr. Mink's own deposition testimony indicates that, at the time his deposition was taken, he did not think his position on the panel was equivalent to one on the Science Advisory Board. (Mink N.T. 202:16-22.)

Dr. Mink's vacillations on his professional and academic qualifications contribute to this Court's strong conclusion that his professional opinions are of no utility. Simply stated, it is unwise to rely upon the opinions of an expert who is uncertain of his own qualifications.

Carpenter Technology Corporation is a Delaware corporation with its principal place of business in Reading, Pennsylvania. (J-33 P 71.) James Adams began working in Carpenter's engineering department in November 1952. (P-331, Adams Dep. 13:1-3.) His immediate supervisors were William Dinkle and Harold Miller. (P-331, Adams Dep. 29:10-17.) Adams directed the department responsible for tracking the costs related to the disposal of Carpenter's waste acids. (P-331, Adams Dep. 21:6-16.) David Mann began working for Carpenter's engineering department in June 1968 (Mann N.T. 4:4-5:3), working directly under Adams (P-331, Adams Dep. 28:10-29:7).

Mann and Adams were both involved in the decisions of Carpenter's purchasing department with respect to purchasing waste disposal services. (Mann N.T. 4:25-9.) Carpenter hired Echo Incorporated, a company owned by Manfred DeRewal, Senior to haul its waste acids. (DeRewal, Sr. Dep. 136:23-137:4, 211:25-212:8; P-44.) On July 8, 1969, Adams received a phone call from a regulatory authority that Echo had encountered difficulties as a result of subsurface pollution at the Revere site. (P-331, Adams Dep. 82:14-84:25.) Of initial importance is that the subject line of Adams' handwritten note from this telephone conversation reads "Re: Echo Inc. (Revere Chemical Co.) & Chemline." (P-44.) This entry demonstrates that Carpenter was familiar with both Echo Incorporated and Revere Chemical Corporation--two companies helmed by Manfred DeRewal, Senior prior to his incorporation of DCC--both of which were shut down due to pollution problems. (P-13, page 2; P-333, DeRewal, Sr. Dep. 15:24-17:17. See also J-24, Appendix D-1.5, AR100152 (news article stating that

DeRewal, Senior "has been a principal in at least six corporations that in the past 10 years have been cited for toxic discharges into river and streams in Bucks County.").) During the same phone call, Adams learned that Chemline, another waste acid hauler used by Carpenter, had illegally dumped waste acid into an abandoned slag pit.[29] (P-331, Adams Dep. 83:22-84:3.) Adams usually did not make notes of his telephone conversations (P-331, Adams Dep. 85:21-24; 86:13-15), however since Adams knew the information conveyed to him over the phone from the regulatory authority was important, he recorded the information in writing and maintained his record of that conversation. (P-331, Adams Dep. 86:1-4; 86:18-21.) Additionally, Adams stated unequivocally that he advised Carpenter's upper management of this conversation. (P-331, Adams Dep. 87:3-15.) The Court accepts Adams' testimony as a statement of factual truth.

On July 15, 1969, one week after Adams received the phone call alerting Carpenter to the pollution practices of Echo and Revere Chemical, Scharfstein[30] and Mann, two Carpenter employees, visited the Revere Chemical facility to evaluate whether Carpenter should hire Revere to remove its waste acids. (P-43; P-331, Adams Dep., Ex. Mann-9, "Trip Report to Revere Chem. Corporation."; Mann N.T. 34:11-17.) Two days after visiting the Revere Chemical facility, Scharfstein wrote a memorandum

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[29] Carpenter continued to use Chemline's waste acid removal services despite actual notice of state concerns with Chemline pollution. (See P-36 (detailing gallons of waste hauled by Chemline from Carpenter during 1973 and 1974).)

[30] Scharfstein was the manager of chemical technology research at Carpenter. (See P-43, page 2.

memorializing the trip, which specifically stated that Manfred DeRewal was the President of Revere Chemical Corporation and that it was "mutually beneficial for Carpenter to establish good relations with East Falls Chemical[31] since they may be of great assistance is extricating [Carpenter] from waste disposal problems at a reasonable cost."[32] (P-43.) It was Carpenter's normal business practice that each person listed as a "cc" on a Carpenter memo or letter receive a copy of that memo or letter. (Mann N.T. 17:13-15; P-331, Adams 78:2-5.) Scharfstein's July 17, 1969 memo was circulated to Carpenter's upper management. (P-43.)

Despite the phone call from the regulatory agency warning Carpenter of Revere's pollution practices, Carpenter nonetheless hired Revere Chemical Corporation to haul its waste acids. (P-45, P-42, P-43.) Shortly thereafter, on February 25, 1970, Mann circulated a memorandum to Carpenter personnel stating that Revere ended its operations in January 1970 due to pollution problems. (P-45.) By the February 25, 1970 memo, Mann informed numerous Carpenter personnel, including upper management, that Revere's operations ended due to pollution problems. (P-45.) Carpenter personnel who received Mann's February 25, 1970 memo, and were therefore

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[31] The memo states that East Falls Chemical Corporation is an agent of Revere Chemical Corporation. (P-43; See also P-331, Adams Dep., Ex. Mann-9.) Thus Carpenter knew that East Falls Chemical Corporation was working for Revere and associated with Manfred DeRewal, Senior.

[32] Also of interest is Scharfstein's statement in the July 17, 1969 memo that, although Revere claimed that its staff consisted of twenty-five people, Mann and Scharfstein only saw eight or ten. (P-43.) Scharfstein's notation of this discrepancy implies that he questioned DeRewal Senior's truthfulness.

aware of Revere's pollution problems, included William Dinkel (chief engineer), Harold Miller (assistant vice president and president of construction), Freehafer (director of purchasing), and Nahm (senior buyer), Schattner (attorney for Carpenter), and Karpen (supervisor directly involved with testing the waste acids). (P-45; P-331, Adams Dep. 29:10-17; Cheri N.T. 105:21-22; Mann N.T. 48:17-49:10.)

Thus, through Scharfstein, Mann, Adams and the purchasing department, Carpenter was actually aware of Manfred DeRewal, Senior's relationship to Revere Chemical Company and Echo Incorporated. (Mann N.T. 33:20-25; P-42; P-43; P-45.) Carpenter's personnel acknowledged Manfred DeRewal Senior's relationship to Revere Chemical Company. (Mann N.T. 33:20-25.) Indeed, in his notes, Mann listed "Fred DeRewal" as a person to be contacted at Revere when waste acid was ready for pick up. (P-42; Mann N.T. 40:15-44:24.)

Nonetheless, Carpenter hired Manfred DeRewal yet again, time in the form of DeRewal Chemical Company, to dispose of its waste acid. (P-34.) DCC charged Carpenter a rate far below any of the other waste haulers at the time. (P-39, P-35.) While DCC charged $ 0.04/gallon, other waste haulers during that time period charged $ 0.06/gallon (King of Prussia), $ 0.07/gallon (KRG Services), and $ 0.074/gallon (Chemline). (P-39.) The differential between DCC's rate and that of the other waste haulers was so great[33] that, when combined with

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[33] DCC's fee was 33.33 percent lower that the bid of King of Prussia, 42.86 percent lower than the bid of KRG and 45.95

actual knowledge of DeRewal Senior's pollution practices, this Court can only conclude that Carpenter chose to retain DCC for economic reasons in spite of its actual awareness of DeRewal Senior's known status as a notorious environmental polluter. This conclusion is made explicit by the February 25, 1970 memo, which states that Revere Chemical Company was shut down due to "*pollution citations*" and that "[b]ecause of the *substantial savings* realized by CarTech [Carpenter] during this venture, other programs will be evaluated for utilization of our waste acids." (P-45 (emphasis added).) The economic motivation for hiring DCC is further illuminated by Reger's testimony that, in the purchase of waste acid removal services, all Carpenter cared about was saving a dollar. (P-330, Reger Dep. 19:2-21.)

For these reasons, this Court concludes Carpenter hired DeRewal Chemical Company to dispose of its waste acids, despite actual knowledge that DCC's owner and operator, DeRewal Senior, had a history of environmental pollution. This decision was economically motivated since the per gallon price charged by DCC was significantly below the bids submitted by other vendors.

N. Carpenter's Lack of Cooperation.

Carpenter received a Section 104(e) Request from EPA for the Boarhead Farms Site. (J-33 P 75.) Carpenter received a General Notice/Special Notice Letter from EPA dated September 28, 2000. (J-33 P 76.) The letter asked Carpenter to resolve its

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percent below the bid of Chemline.

potential liability to the United States for the alleged past costs incurred, and to agree to perform the work required by the ROD, but not included in the 2000 Consent Decree. (J-33 P 76.) Carpenter did not cooperate with the EPA.

O. Allocation

The Boarhead Farms Site is a very complicated environmental system that will require an extensive cleanup for an indefinite future period. (Brown N.T. 71:3-18.) The complexity derives from numerous factors. The first contributing factor is the pattern of waste disposal at the Site. (Vandeven N.T. 156:18-157:15, 182:23-187:17.) Over the years, many different types of waste were disposed at the Boarhead Farms Site. (Vandeven N.T. 137:21-138:11, 156:22-157:15.) Additionally, the wastes disposed came in various forms, such as bulk releases of large quantities of liquids and buried drums. (Vandeven N.T. 156:22-157:5.) Moreover, the differing wastes were disposed in multiple and overlapping locations. (J-30, Figure 1-4; Vandeven N.T. 146:20-147:1, 148:11-21.)

Because various types of waste were disposed at multiple and overlapping locations, the waste interacted, releasing a wide variety of hazardous substances into the environment, contributing to the complex environmental conditions and necessitating the response activities taken at the Site. (Vandeven N.T. 148:11-21, 156:18-157:15, 185:20-187:8.) For example, bulk acids disposed at Boarhead Farms interacted with both naturally and non-naturally occurring metals, increasing the solubility and mobility of the metals. (Vandeven N.T. 164:5-167:23.)

Metal drums buried at the Site were corroded by bulk acids disposed at the Site, thereby causing the drums to release their contents. (Vandeven N.T. 157:3-9.) Buried drums containing acid waste corroded, releasing their contents to interact with other waste and environmental media. (Vandeven N.T. 157:10-12.) Additionally, bulk acidic waste disposed at the Boarhead Farms increased the solubility and mobility of naturally occurring metals, thereby causing the metals to enter the groundwater, thus increasing the level of contaminants in the groundwater. (Vandeven N.T. 167:1-23.)

Acids disposed of at the Site also exhausted the buffering capacity of the soil. (Vandeven N.T. 168:19-169:14.) Exhaustion of the buffering capacity caused the acid wastes and contaminants in the acid waste to move more readily through the soil. (Vandeven 169:15-24.) Exhaustion of the buffering capacity also allowed non-acidic contaminants to move more readily through the soil. (Vandeven N.T. 170:5-9.) Indeed the soils reached such an acidic level at the site that they are digesting themselves. (Brown N.T. 64:12-17.) As acids digest the soil, the soil gives off acidic ions, which further digest the soil. (Brown N.T. 64:12-17.) Thus today, no less than twenty years after the acid was dumped at Boarhead Farms, the soils have not yet returned to their original pH, and there is no natural mechanism to neutralize the soils at the Site. (Brown N.T. 62:20-62:17.)

Thus, the acid wastes, by increasing the solubility and mobility of metals and exhausting the buffering capacity of the soil, contributed substantially to the release of metals and other contaminants into the

environment at Boarhead Farms. (Vandeven N.T. 164:5-170:9, 172:15-173:13.) The mobilized metals entered the groundwater, thereby increasing the concentration of contaminants in the groundwater. 164:5-166:25, 168:7-13, 172:15-173:9, 210:12-211:9.) Moreover, metals that were actually contained within acid waste would flow through the soil and groundwater much more readily adding massive contaminants to the groundwater. (Vandeven N.T. 174:20-175:5.) As a result, nearly all of the groundwater at Boarhead Farms is contaminated. (Vandeven N.T. 151:1-154:21, 163:17-164:4; J-30, Figures 1-5 and 1-6.)

The contaminated groundwater at Boarhead Farms is of particular concern. (Vandeven N.T. 135:16-138:11.) In fact, the baseline human health risk assessment in the Remedial Investigation and Feasibility Study concluded that the risks associated with residential use of groundwater at both on-site and off-site locations, including residential wells, exceeded acceptable limits. (Vandeven N.T. 173:14-19, 176:14-179:20; J-26, Table 7.) Among other contaminants, metals were present in the groundwater at levels the EPA considered to exceed acceptable standards. (Vandeven N.T. 176:14-179:20.) Additionally, the groundwater in the vicinity of the areas where acid wastes were dumped, was highly acidic when tested in the 1990s, and had a pH as low as four. (Brown N.T. 48:3-49:8.) The waste acids dumped in the areas where the water was sampled were the cause of the low pH. (Brown N.T. 506-507.)

The need for remediation at the Site is driven by inorganic and organic chemicals in the soil and

groundwater.[34] (Vandeven N.T. 137:15-138:11, 142:5-18) Metals, in particular, contributed to the need for and cost of remediation at the Boarhead Farms Site. (Vandeven N.T. 176:14-179:20, 180:11-16.) This is illustrated by the fact that all of the remedial alternatives that were considered for the Site involved precipitation of the metals to reduce their concentration in the groundwater. (Vandeven N.T. 180:6-181:18.)

Although the levels of metals in the groundwater is of concern, the EPA identified a total of fifty-three chemicals of potential concern in the shallow groundwater. (J-26, Table 7.) This varied and widespread contamination is a result of waste disposal in multiple and overlapping areas, and the concomitant commingling and dispersal of the waste throughout the soil and groundwater. (Vandeven 185:25-186:8.) As such, no accurate or reliable

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[34]Dr. Mink opined that 95% of the baseline risk assessment (EPA's assessment of the risk the Site poses to human health and the environment) was caused by volatile organic compounds ("VOCs"), semi-volatile organic compounds ("SVOCs"), and arsenic, and that therefore 95% of the remediation costs were caused by VOCs, SVOCs, and arsenic. (Mink N.T. 190:1-24.; 205:9-206:3.) In other words, Dr. Mink opined that the response costs at the Site were driven by the risk posed by particular contaminants.

However, there is no evidence that the greater the risk a particular contaminant poses to human health or the environment, the greater the response cost of cleaning that contaminant. In fact, at the Boarhead Farms Site, the groundwater treatment plant is treating many different contaminants, at the same cost, regardless of the risk they pose. (Seibel N.T. 64:11-75:8.) Moreover, there is ample evidence that all of the contaminants disposed of at the site commingled and interacted with each other exacerbating the environmental impact, such that the effects of one contaminant cannot reasonably be separated from the effects of other contaminants. (Vandeven N.T. 156:18-157:15, 182:23-187:17; Brown N.T. 71:3-78:18.)

method exists to distinguish one party's waste from the waste of another party. (Vandeven 186:9-187:17; Brown 54:10-19.) Furthermore, there is no way to separate out the remediation of any particular contaminant or group of contaminants. (Vandeven N.T. 182:23-187:17; Brown 54:10-19.) Therefore, the costs of investigating and remediating the Boarhead Farms Site cannot be compartmentalized according to any particular contaminant or group of contaminants. (Vandeven N.T. 186:9-187:17; Brown 54:20-55:22.) Stated differently, all of the funds expended investigating and remediating the Site are a direct result of each and every waste stream at the Site. (Vandeven N.T. 186:9-187:17; Brown 64:25-65:3.)

III. Conclusions of Law

A. Trial Stipulations

The following stipulations were submitted by the parties at trial and are accepted by the Court.

1. The Boarhead Farms Superfund Site, located in Upper Black Eddy, Pennsylvania, is a "facility" as defined in *42 U.S.C. § 9601(9)*.

2. The Site is a "site" as defined in Section 103 of the HSCA, 35 P.S. § 6020.103.

3. "Hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) were disposed of, placed on, or otherwise became located at the Site.

4. There have been "releases" as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), or threatened releases of hazardous substances into the environment at or from this Site.

5. There have been "releases" or "substantial threats of releases" of "hazardous substances" and "contaminants" into the environment at or from the Site, as those terms are defined in Sections 101(22), 103 and 501(a) of HSCA, 35 P.S. §§ 6020.101(22), *6020.103*, and *6020.501(a)*.

6. The release or releases have caused the incurrence of "response" costs at the Site, as defined in 42 U.S.C. § 9601(25).

7. Carpenter Agere, Cytec, Ford, SPS, and TI are all persons as defined in 42 U.S.C. § 9601 and 35 P.S. § 6020.103.

8. The costs incurred by the OU-1 and OU-2 Groups were necessary to comply with the requirements of the ROD and were consistent with the National Contingency Plan.

B. Orphan Shares

An "orphan share" is the share of waste from unidentifiable sources or insolvent PRPs. *Action Mfg. Co., Inc. v. Simon Wrecking Co., 428 F. Supp. 2d 288, 328 (E.D. Pa. 2006)*. Orphan shares should be allocated equitably among plaintiff and defendant PRPs. In this particular case, the Court will not consider any volumes of waste from unidentifiable

sources or insolvent PRPs because any such wastes would be orphaned, and there is no legal or equitable reasons to allocate such orphan shares to any particular party. All parties had the opportunity to bring claims in this action against any person whom they believed to be liable. Consequently, any orphan share would be allocated pro-rata amongst all the parties, in which case the parties' shares, relative to each other, would not change.

Knoll International is also an orphan share. Knoll's share is not equitably or legally allocable to any party. As such, Knoll's waste will not be considered in determining the plaintiffs', settled parties', or Carpenter's percentage share of waste disposed of at the Site. Diaz' share of the volume of waste disposed of at the Site is an orphan share. (October 29, 2007 Order at 1.) It was previously determined by this Court that AETC was responsible for Diaz' waste stream. (October 29, 2007 Order.) Because plaintiffs settled with AETC, plaintiffs are responsible for Diaz' volumetric share.

C. Plaintiffs' Claims

CERCLA § 113(f) "authorizes a PRP to seek contribution 'during or following' a suit under § 106 or § 107(a)." *United States v. Atlantic Research Corp., 551 U.S. 128, 127 S. Ct. 2331, 2338, 168 L. Ed. 2d 28* (quoting *42 U.S.C. § 9613(f)(1)*. Likewise, PRPs who resolved their liability to the United States or a State through an administrative or judicially approved settlement can seek contribution through § 113(f)(3)(B). *Atlantic Research, 127 S. Ct. at 2338 n.5; 42 U.S.C. § 9613(f)(3)(B).* However, a

PRP who voluntarily incurs response costs cannot seek contribution from other PRPs under § 113(f).

Rather, in Atlantic Research, the Supreme Court held that costs incurred voluntarily by a PRP, which are not reimbursement, are recoverable under *§ 107(a)(4)(B). Atlantic Research, 127 S. Ct. at 2338.* In other words, a PRP "may recover under § 107(a) without any establishment of liability to a third party." Id. The Court specified that when a PRP pays money to satisfy a settlement agreement or court judgment it does not "incur its own costs of response", but rather, reimburses another party. Id. Thus, a PRP who pays money pursuant to a settlement or court judgment can only seek recovery by way of a § 113(f) contribution claim. Id.

One question specifically left undecided in Atlantic Research was whether costs of response which are compelled, but not reimbursement, are recoverable under § 113(f) or § 107(a), or both. *Id. at 2338 n.6.* The Atlantic Research Court cited *United Technologies Corp v Browning-Ferris Indus., Inc., 33 F.3d 96, 97 (1st Cir. 1994)*, as an example of costs that were compelled but not reimbursement to another party. In United Technologies, the parties to the consent decree agreed "to undertake and complete corrective work at the Site in accordance with a plan for remedial action." *33 F.3d at 97.* When the parties made payments for the corrective work, these expenditures were not voluntary because they were compelled under the Consent Decree. However, monies spent by the parties went directly to the corrective work, and thus did not constitute reimbursement. Thus, after Atlantic Research, it is an open question of law as to whether obligations a

party incurs pursuant to a Consent Decree, which are not reimbursement, are recoverable under § 113(f), § 107(a), or both. *127 S. Ct. at 2338 n.6.*

This is of potential concern as an award under § 113(f) is not identical to one under § 107(a). Although in Atlantic Research the Supreme Court declined to decide whether § 107(a) provides for joint and several liability, it is the law of the Third Circuit that recovery under § 107(a) is joint and several. See *Atlantic Research, 127 S. Ct. at 2339 n.7* (assuming without deciding that § 107(a) provides for joint and several liability). But see *E.I. DuPont De Nemours and Co. v. United States, 460 F.3d 515, 521-22 (3d Cir. 2006)* (stating that § 107(a) provides for joint and several liability) (reversed on other grounds). Thus, any recovery by plaintiffs in this case under their *§ 107* claims would be joint and several.

In the present action, following the Atlantic Research decision, plaintiffs amended their complaint to include claims under both *§ 107* and § 113(f). Cytec, Ford, SPS, and TI have claims under CERCLA § 113(f) for EPA's past response costs, which these entities reimbursed to EPA pursuant to the OU-2 Consent Decree. (Pls.' Fifth Am. Compl.)

Agere was not a party to either of the 2000 or 2001 Consent Decrees. (See J-6; J-7; J-33 PP 24; 40.) However, Agere agreed with the signatories to the Consent Decrees to fund and perform the OU-1 and OU-2 remedial design and remedial action ("RD/RA") work, and to pay for the EPA's oversight costs related to this work. (J-33 PP 25, 41.) Agere seeks recovery under *§ 107* for the sums it paid pursuant to its agreement with the parties to the 2000 and 2001 Consent Decrees.

TI was a party to the 2001 Consent Decree, but not the 2000 Consent Decree. (J-33 PP 24, 40.) However, TI agreed with the parties to the 2000 Consent Decree to fund and perform the OU-1 RD/RA work, and to pay for the EPA's oversight costs related to this work. (J-33 P 25.) Because TI was not a party to the 2000 Consent Decree, it has a cost recovery claim under *§ 107* for sums it paid to fund the OU-1 work and for EPA's oversight costs related to that work. In addition, TI has claims under *§ 107* and § 113(f) for the OU-2 RD/RA work and the EPA's oversight costs related to that work, as these costs were compelled under the Consent Decree but were not reimbursement to the EPA.

Cytec, Ford, and SPS, signatories to the 2000 and 2001 Consent Decrees, have *§ 107* and § 113(f) claims for the OU-1 RD/RA work, EPA's costs related to the OU-1 work, the OU-2 RD/RA work, and EPA's costs related to the OU-2 work, as these costs were not reimbursed to the EPA.

In addition, Carpenter has CERCLA § 113(f) counter-claims against all plaintiffs.

The Court shall resolve all parties' claims by determining the equitable shares of Carpenter, Cytec, Ford, SPS, TI, Agere and the settled parties.

D. Statute of Limitations

CERCLA § 113(f) provides PRPs with the right to contribution. *42 U.S.C. § 9613(f)(1); United States v. Atlantic Research Corp., 551 U.S. 128, 127 S.Ct. 2331, 2337, 168 L. Ed. 2d 28 (2007).* "Thus, § 113(f)(1) permits suit before or after the

establishment of common liability." *Atlantic Research, 127 S.Ct. at 2338.* If a PRP settles a claim with EPA through a Consent Decree, in order to assert a contribution claim against other PRPs, the EPA's claim must have been valid at the time of the settlement. If EPA's claim were not valid, there would be no common liability to serve as the basis for a contribution action.

Carpenter argues that, "at the time [p]laintiffs Cytec, Ford, SPS and TI signed the OU-2 Consent Decree, [p]laintiffs were not liable to the USEPA for any recovery costs because the statutory period authorizing USEPA to seek those costs had expired." (Doc. No. 407, page 7.) Therefore, Carpenter contends that there was no common liability between it and plaintiffs to serve as the basis for plaintiffs' contribution claims under § 113(f).[35]

1. CERCLA Statute of Limitations for § 107(a) Claims.

The relevant CERCLA statute of limitations is *42 U.S.C. § 9613(g)(2)*, which governs the timeliness of an EPA § 107 claim against plaintiffs. The statute of limitations reads as follows:

> (2) Actions for recovery of costs

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[35] For clarity it should be noted that Carpenter's statute of limitations defense only concerns Cytec, Ford, SPS, and TI's § 113(f) claims arising from the OU-2 Consent Decree. Agere has a § 107(a) claim for the past response costs. Thus, for purposes of this section discussing the statute of limitations, the term plaintiffs refers to Cytec, Ford, SPS, and TI.

> An initial action for recovery of the costs referred to in *section 9607* of this title must be commenced--
>
> > (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and
> >
> > (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

42 U.S.C. § 9613(g)(2). In order to apply this statute of limitations, it is necessary to know what type of activities can be considered part of a "removal action" and what type of activities can be considered part of a "remedial action." The term "removal" is statutorily defined as:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be

necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under *section 9604(b)* of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [*42 U.S.C.A. § 5121 et seq.*].

42 U.S.C. § 9601(23). Remedial action is defined as:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term

> includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24). These two definitions, which apply to key terms in the statute of limitations, are

somewhat vague and uncertain, and overlap. *Geraghty and Miller, Inc. v. Conoco Inc., 234 F.3d 917, 926 (5th Cir. 2000)* ("[T]he CERCLA definitions are expansive enough that certain activities may well be covered by both."). *United States v. Manzo, 182 F. Supp. 2d 385, 400 (D.N.J. 2000)* ("These definitions obviously overlap."). As with other ambiguous CERCLA provisions, the statute of limitations should be construed in a manner consistent with CERCLA's broad remedial purpose and overriding policy of cleaning up hazardous waste at the expense of those who created it. *Manzo, 182 F. Supp. 2d at 401* (citing *FMC Corp. v. Dep't of Commerce, 29 F.3d 833, 840 (3d Cir. 1994)). Kelley v. E.I. DuPont de Nemours and Co., 17 F.3d 836, 843 (6th Cir. 1994).*

2. EPA's Claim was Not Time Barred.

Plaintiffs signed the Administrative Order On Consent, EPA Docket No. III-2001-0010-DC, on March 29, 2001.[36] (J-9, pages BSAI052835-38.) Through this agreement, plaintiffs agreed to pay EPA $ 7,000,000 for past response costs.[37] (J-9, page 052894.) At the time plaintiffs entered into this agreement, EPA's potential cause of action for the past response costs was not barred by the statute of limitations.

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[36] Cytec signed the Consent Order on March, 29, 2001, Ford signed on March 23, 2001, SPS signed on March 28, 2001, and TI signed on March 29, 2001. (J-9, pages BSAI052835-38.)

[37] EPA's past response costs were actually in excess of $ 13 million, but plaintiffs settled this claim for $ 7,000,000. (J-18; Judge N.T. 50:14-23.)

The EPA conducted a single "removal action" which ended, at the earliest, on November 18, 1998, when EPA issued the ROD.[38] (J-26.) Carpenter's attempt to parse out EPA's response activity into separate removal actions is untenable. All of EPA's response actions--beginning with the Remedial Investigation in 1984 and continuing through the ROD--were interdependent. Take, for example, a marathon runner who must tie her shoes before a race. While this activity is very different from the actual running of the race, the marathoner would find it quite difficult to complete the race having not tied her shoes. In much the same way, the EPA's actions were all built upon one another and were interrelated and interdependent. EPA's Preliminary Assessment and Site Investigation confirmed contamination at the Site, which led EPA to conduct a more thorough Remedial Investigation. This in turn alerted EPA that immediate action should be taken with respect to some hazardous waste at the Site. For example, EPA excavated and removed some of the buried drums and intercepted the groundwater to remove volatile organic compounds. In the meantime, EPA conducted a Feasibility Study, made a decision regarding the remedial action to be taken, and began the remedial design. All of this activity falls under the purview of "removal action," as defined by *42 U.S.C. § 9601(23)*, and because it is one continuous interrelated process, it constitutes a single removal action. (Brown N.T. 71:11-72:9.) See also *Kelley v. E.I. DuPont de Nemours and Co., 17*

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[38] It is more likely that EPA's removal action was ongoing as of September 28, 2000. (See J-7, BSAI 103746 P G ("EPA conducted removal action at the Site . . . continuing to the present.").) However, in giving Carpenter every reasonable consideration, the Court selects the earlier date.

F.3d 836 (6th Cir. 1994) (finding that site inspection and sampling, which were followed by physical removal of drums and then a remedial investigation and feasability study, constituted one single removal action).

Carpenter cites several instances in which the EPA seemingly refers to multiple removal actions at Boarhead Farms. (See J-26, page 3, 11;[39] J-23, page 3, 4, 7.) However, as addressed in this Court's previous Order dated April 22, 2008 (Doc. No. 317), in certain other instances EPA refers to a single or continuous removal action. (See, e.g., J-6, BSAI103746, P G.) More importantly, however, characterizing EPA's conduct as four separate removal actions does not accurately describe actual activity at the Site. First, it ignores the fact that all of EPA's activities during this time were interrelated and interdependent. Second, the supposed four removal actions only encompass three drum excavations[40] and the interception of groundwater (essentially, the physical removal activity at the Site). This characterization completely ignores EPA's Preliminary Assessment, Site Investigation, Remedial Investigation and ROD, among other activities, all of which are removal activities but would, apparently, not be covered under defendant's conceptualization.

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[39] Carpenter also quotes passages from pages 10 and 16 of the Record of Decision as having references to multiple removal actions. (See Doc. No. 407, page 9.) However, review of the ROD indicates that no such quotations (or any reference to multiple removal actions) exist on those pages. (See J-27, page 10, 16.)

[40] One of which was conducted and paid for by General Ceramics and is not related to this litigation.

When plaintiffs entered into the OU-2 Consent Decree, they not only agreed to reimburse EPA for past costs related to the removal action, but they also agreed to perform the OU-2 remedial design and remedial action and to pay for any costs incurred by EPA related to the OU-2 work. Thus, plaintiffs agreed to perform remedial action that EPA would otherwise have performed.[41] This is evidenced by the 2001 Consent Decree which states that plaintiffs "will *assume responsibility* for the performance of a portion of the [remedial design] and *all of the [remedial action]* for all OU-2 Activities . . . ." (J-7, page BSAI052846 (emphasis added).)

When plaintiffs signed the OU-2 Consent Decree, it was reasonable for them to believe that, if they did not sign it, EPA would begin the OU-2 remedial action before November 18, 2001. EPA's remedial action would therefore commence within three years of the removal action, providing for a six year statute of limitations, and allowing cost recovery of both the removal and remedial actions under *42 U.S.C. § 9613(g)(2)(B)*. Because EPA was not foreclosed from bringing a claim against plaintiffs under § 107(a) for its past response costs, plaintiffs and Carpenter shared a common liability to EPA. Plaintiffs settled this liability and are therefore entitled to contribution from Carpenter.

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[41] The OU-1 and OU-2 work detailed in the ROD constitutes remedial action as it is "consistent with a permanent remedy taken . . . to . . . minimize the release of hazardous substances . . . ." *42 U.S.C. § 9601(24)*.

Moreover, a contrary conclusion would encourage PRPs to delay and discourage settlement with the EPA. If PR-P's were not entitled to contribution for settled claims which *might* have been barred by the statute of limitations, then there would be no incentive to settle such claims. Rather, PRPs would be encouraged to wait and see if EPA inadvertently allowed its claims to spoil. This is in contravention to CERCLA's goal of encouraging prompt and effective cleanups.

Because EPA's claims were not time barred at the time plaintiffs entered into the OU-2 Consent Decree, plaintiffs have valid contribution claims against Carpenter.

E. CERCLA Liability and Allocation.

Under § 113(f), a plaintiff must demonstrate liability under *§ 107* and that apportionment is feasible. *New Jersey Turnpike Authority v. PPG Industries, Inc., 197 F.3d 96, 104 (3d Cir. 1999).* Liability under *CERCLA § 107* is established by demonstrating that: (1) the defendant is a potentially responsible party ("PRP"); (2) hazardous substances were disposed at a facility; (3) there has been a release or threatened release of hazardous substances from the facility into the environment; and (4) the release or threatened release required or will require the plaintiff to incur response costs. See *42 U.S.C. § 9607(a); New Jersey Turnpike Auth. v. PPG Industries, Inc., 197 F.3d 96, 103-04 (3d Cir. 1999).* The definition of PRP includes "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of

hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances." *42 U.S.C. § 9607(a)(3).*

In addition to these four elements, the plaintiff must also prove what is commonly referred to as the "nexus" requirement. *New Jersey Turnpike Auth., 197 F.3d at 105.* This burden is not onerous, and plaintiff need not prove a specific causal link where there are multiple sources of contamination. *Id. at 105; United States v. Alcan Aluminum Corp., 964 F.2d 252, 266 (3d Cir. 1992).* Rather, the nexus requirement is met where a plaintiff shows some connection between the defendant's activities and the contamination at the site. *New Jersey Turnpike Auth., 197 F.3d at 105.* Where a plaintiff alleges that a PRP "arranged for the transportation or disposal of hazardous substances . . . such a plaintiff must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs." *Id. at 104* (internal quotations omitted) (citing *Alcan Aluminum Corp., 964 F.2d at 266*).

After liability under *§ 107* is demonstrated, the plaintiff must then show that apportionment is feasible. The court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *42 U.S.C. § 9613(f)(1).* The district court has discretion in determining what factors to consider. *Beazer East, Inc. v. Mead Corp., 412 F.3d 429, 446 (3d Cir. 2005).* Equitable factors often considered by courts are those

listed in the unsuccessful CERCLA amendment proposed by then-Representative Al Gore. *Action Mfg. Co., Inc. v. Simon Wrecking Co., 428 F. Supp. 2d 288, 329 (E.D. Pa. 2006)* (gathering cases in the Third Circuit). These factors, commonly referred to as the "Gore Factors", include: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount of hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking in to account characteristics of such waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or environment. 126 Cong. Rec. 26,799-81 (1980); See also *Action Mfg. Co., Inc., 428 F. Supp. 2d at 329.*

1. Carpenter is a liable party under CERCLA § 107(a).

Carpenter stipulated to three of the four elements of the *CERCLA § 107* action. (J-33 PP 1, 2, 4, 5, 7, 8.) Specifically, Carpenter stipulated that the Boarhead Farms Superfund Site is a facility (J-33 PP 1-2), that hazardous substances were disposed at the Site (J-33 P 4), that there were releases or threatened releases of hazardous substances into the environment at or from the Site (J-33 P 5), and that the releases or threatened releases caused the incurrence of response costs at the Site (J-33 P 7). At trial, Carpenter disputed that it is a PRP. Additionally,

Carpenter argued that plaintiffs failed to meet their burden with respect to establishing a nexus between any Carpenter waste and the Boarhead Farms Superfund Site.

a. Carpenter is a Potentially Responsible Party.

The Court finds that Carpenter Technology arranged with DCC for the transportation and disposal of hazardous substances, and is therefore a potentially responsible party as defined in *42 U.S.C. § 9607(a)(3)*. Initially, it is notable that there was a written contract between Carpenter and DCC in which DCC agreed to "remove and suitably dispose of waste hydrochloric acid pickling solution ("acid") from Carpenter's plant in Reading, Pennsylvania." (P-34.) Carpenter and DCC entered into this contract on June 12, 1973. (Id.) The contract had no termination date, but was to continue subject to termination at any time by either party upon thirty days notice. (Id.)

Moreover, Carpenter's spent hydrochloric acid pickling solution ("waste pickle liquor") is a hazardous substance as defined in CERCLA. Spent pickle liquor generated by steel finishing operations is itself listed as a hazardous substance under CERCLA. 42 C.F.R. § 302.4. Additionally, Carpenters' waste pickle liquor contained multiple metals,[42] many of which are CERCLA hazardous substances. *42 U.S.C. § 9601(14); 40 C.F.R. § 302.4.* Lastly, Carpenter's waste pickle liquor is corrosive

[42] The waste pickle liquor contained significant amounts of iron, pickle, and chromium, and smaller amounts of cobalt, copper, magnesium, manganese, phosphorus, titanium, and vanadium. (P-40.)

(Vandeven N.T. 157:5-13; 164:5-12; 172:19-22), rendering it a hazardous waste under the RCRA, and therefore under CERCLA as well. *42 U.S.C. § 9601(14); 42 U.S.C. § 6921; 40 CFR § 261.20.*

In sum, the Court finds that Carpenter arranged for DCC to transport its waste pickle liquor, a hazardous substance as defined in CERCLA. As such, Carpenter is a potentially responsible party as that term is defined in *42 U.S.C. § 9607(a)(3).*

b. Plaintiffs Established a Nexus Between Carpenter's Waste and the Boarhead Farms Superfund Site.

As stated in Section 11, Findings of Fact, supra, the Court finds the testimony of the DCC truck drivers that they disposed of Carpenter's waste acids at the Boarhead Farms Site highly credible. First, all of the drivers's testimony regarding DCC's waste disposal practices, whether presented through deposition transcript or live testimony, was consistent and rings true despite the passage of decades. Carpenter's characterization of Bruce and Freddie DeRewal's testimony as "conflicting" is unfair. Additionally, the Court rejects Carpenter's opinion of the veracity of Bruce and Freddie DeRewal, both of whom were credible.

As such, plaintiffs established a nexus between Carpenter's waste and the Boarhead Farms Site.

2. Equitable Allocation.

Based on the record before us, it is not possible to fairly and equitably allocate the costs of any

particular response actions to any particular species of waste at the Site. Volume of waste disposed at the Site is the most equitable manner of cost allocation and the Court is not hesitant to use this as its primary equitable factor.[43] Additionally, because

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[43] Carpenter notes in its Proposed Findings of Fact and Conclusions of Law, that this Court previously decided that the Uniform Comparative Fault Act ("UCFA") governs the allocation of the settled parties' share of the liability in this matter. (June 30, 2004 Order.) The UCFA states in relevant part:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

UCFA § 6.

Carpenter argues that, because plaintiffs have not disclosed the dollar amounts of their settlements, it is impossible to tell whether it might be more equitable to treat the settlement values as representative of the settled parties' equitable shares of liability. The Court can discern no reason why the settlement values would be a "more equitable" method of allocating liability in this case, and Carpenter has not offered a reason.

Under UCFA, plaintiffs bear the risk that the potential settling defendant's share of the cleanup costs may be greater than the settlement amount. Thus, plaintiffs have every incentive to settle for as close to the settling party's actual share as possible. UCFA states that "the claim of the releasing person against other persons is reduced by the released person's *equitable share of the obligation*." UCFA § 6 (emphasis added). Thus, a defendant's liability is reduced by the settling party's equitable share of the liability, not by the dollar value of the settlement. Just as plaintiffs bear the burden for a shortfall, so they reap the benefit of any windfall. *American Cyanamid Co. v. King Industries, Inc., 814 F. Supp. 215, 218 (D. R.I. 1993).*

To the extent Carpenter argues that plaintiffs have "not put

culpability and cooperation are significant equitable considerations, they will be considered in the allocation equation.

The total volume of waste disposed of at the Site from plaintiffs, settled parties, and Carpenter is 1,594,668 gallons. The total volume of waste disposed at Boarhead Farms by Carpenter is 998,284 gallons. Carpenter's percentage share of the total volume is 62.60%. Plaintiffs' (including parties with whom plaintiffs have settled) percentage share of the total volume is 37.40%.

Culpability is an appropriate equitable factor in resolving contribution claims. *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat, 195 F.3d 953, 959 (7th Cir. 1999)* ("[B]lameworthiness is relevant to an equitable allocation of joint costs."); *Bedford Affiliates v. Sills, 156 F.3d 416, (2d Cir. 1998)* (allocation based on culpability). Carpenter hired Revere Chemical Company to haul its waste acids, and knew that Manfred DeRewal was the president

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forth any evidence on the potential equitable share of the liability of any of the settled parties" and therefore failed to meet their burden under § 113(f), this statement is erroneous. (Doc. No. 396, page 33.) Plaintiffs entered into a stipulation with now-settled defendant Handy & Harman Tube Company as to the volume of each plaintiffs' waste that was disposed of at the Boarhead Farms Site. (P-329 P 5.) Although Handy & Harman settled, the stipulation is still evidence of plaintiffs' volumetric share. Although Carpenter did not enter into this particular stipulation, it is nonetheless evidence of plaintiffs volumetric shares. Additionally, Carpenter introduced plaintiffs' answers to contention interrogatories into evidence, and these answers corroborate the volumes of plaintiffs' waste disposed of at the Site. (C-27, Ex. A.) Indeed, some of the plaintiffs' stipulated volumes waste exceed that in the contention interrogatories. (Compare P-329, P5 with C-27, Ex. A.)

of that company. Additionally, there is evidence that Carpenter was involved with Manfred DeRewal, Senior's other waste hauling company, Echo, Incorporated. Carpenter gained actual knowledge of Manfred DeRewal's status as a polluter in 1970 when it learned that both Echo Incorporated and Revere Chemical Company were shut down for pollution practices. Nonetheless, Carpenter hired DeRewal Senior again, in the form of DeRewal Chemical Company in June 1973, at costs significantly below the bids of DCC's competitors. The same year, Carpenter hired Chemline to haul its waste acids-- yet another company that Carpenter knew had pollution problems. Thus, Carpenter made the decision to put its harmful wastes into the hands of DeRewal Senior, a known polluter. Even if, as Carpenter asserts, it was informed by DCC that its wastes would be recycled at Sylvan Chemical Corporation, Carpenter relinquished its potent waste acids to a known polluter at a cost significantly below competing bids. Thus, Carpenter's contention that it expected DCC to recycle the waste acid was, at best, negligent and, at worst, purposefully ignorant. Carpenter was on notice that its wastes were very likely being disposed of in a unsafe an illegal manner since environmental pollution was the established business practice of its chosen vendor. Carpenter's conduct in this case is an important factor which must be considered in determining the parties' allocable equitable shares.

Cooperation with the government is also an appropriate equitable factor to consider in allocating response costs under § 113(f). *United States v. Atlas Minerals & Chemicals, Inc., 1995 U.S. Dist. LEXIS 13097, 1995 WL 51034 at *230 (E.D. Pa 1995).*

Cooperation from PRPs in settling with the EPA and agreeing to cleanup Superfund sites is central to furthering the statutory goal of rapid and effective cleanups. *In re Tutu Water Wells CERCLA Litig., 326 F.3d 201, 206 (3d Cir. 2003)* (citing *United States v. Occidental Chem. Corp., 200 F.3d 143, 147 (3d Cir. 1999)).* One of CERCLA's underlying policies is to encourage and reward PRPs who settle with the EPA and to create a financial disincentive for PRPs who refuse to cooperate. *United States v. Alcan, 25 F.3d 1174, 1184-85 (3d Cir. 1994).* Plaintiffs entered into two settlements with EPA in which they reimbursed EPA's past costs claim and agreed to perform the remaining work at the Site. Carpenter received a § 104(e) request and a General/Special Notice Letter from EPA requesting Carpenter to resolve its potential liability to the United States for past response costs and to commit to performing the work required by the ROD, but not included in the 2000 Consent Decree. Carpenter, however, rejected the entreaty. Plaintiffs' cooperation with the EPA and Carpenter's lack of cooperation are equitable factors that this Court will take into consideration in making its allocation.

Carpenter's volumetric share is 62.60%. However, because Carpenter knew that DeRewal to be an egregious polluter, but nonetheless elected to use his discounted services, and also in consideration of Carpenter's decision not to cooperate with the EPA, the Court finds that a significant increase in Carpenter's equitable share is warranted. Carpenter's equitable share of plaintiffs' response costs through 2007 and plaintiffs future response costs is 80%. Carpenter's equitable share represents its 62.60% volumetric share, plus an additional

8.70% for dealing with a known polluter, plus an additional 8.70% for failure to cooperate with the EPA. Plaintiffs' equitable share is 20%.[44]

F. Recoverable Costs

Plaintiffs' total recoverable response costs through 2007 are $ 13,678,378.55. The response costs incurred by plaintiffs were necessary and consistent with the national contingency plan. (J-33 P 60.) Further, "[a]ny response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA will be considered consistent with the [National Contingency Plan]." *40 C.F.R. § 300.700(c)(3)(ii)* (internal quotations omitted). Carpenter is liable to plaintiffs for 80% of the total recoverable response costs through 2007, which is $ 10,942,702.84.

Plaintiffs are also entitled to a declaratory judgment in their favor and against Carpenter. *42 U.S.C. § 9613(g)(2).* Carpenter is liable for 80% of all future response costs, as measured from January 1, 2008, for response actions pursuant to the 2000 and 2001 Consent Decrees.

G. Prejudgment Interest.

CERCLA § 107 and the HSCA provide for prejudgment interest. An award of prejudgment

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[44] Pursuant to this Court's previous determination that plaintiffs are responsible for any and all equitable shares of settled parties. (June 30, 2004 Order.)

interest is mandatory under *CERCLA § 107. Caldwell Trucking PRP v. Rexon Technology Corp., 421 F.3d 234, 247 (3d Cir. 2005). Section 113* does not provide for prejudgment interest, however, the Third Circuit in Caldwell Trucking held that an award of prejudgment interest in a contribution claim is discretionary. *421 F.3d at 247.*

CERCLA Section 107(a)(4) states:

> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

42 U.S.C. § 9607(a)(4)(D). Plaintiffs' June 18, 2002 Complaint stating that plaintiffs had settled EPA's past costs and thereby incurred $ 7,000,000 in costs, satisfies the requirements of *§ 9607(a)(4)(D).* See

Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., 100 F.3d 792, 801 (10th Cir. 1996) (holding that complaint notifying defendant that plaintiff incurred in excess of $ 1 million in response costs satisfied the requirements of *§ 9607(a)(4)(D)*).

Awarding prejudgment interest is appropriate where a plaintiff has been denied the use of an ascertainable amount of money for a period of time because there is an actual loss. *Caldwell Trucking, 421 F.3d at 247.* "The purpose of contribution is to equitably apportion response costs among liable parties." *Bancamerica Commercial Corp., 100 F.3d at 801.* Failure to grant prejudgment interest may result in an inequitable allocation as parties incurring response costs lose the time value of their money. Id. Additionally, declining to grant prejudgement interest in a CERCLA contribution action encourages parties to delay and avoid incurring cleanup costs, which is in contravention to the fundamental purposes of CERCLA. Id.

In the present case, plaintiffs assumed the operation and maintenance of the Site in 2000. They have since agreed to perform all of the remedial work required in the ROD and have settled EPA's past costs claim. As such, plaintiffs have been deprived of the use of millions of dollars which were instead expended on Site remediation. Prejudgment interest is appropriate in this case to compensate plaintiffs for the lost time value of their money.

Consistent with this Court's determination that Carpenter is adjudged liable for 80% of the response costs, plaintiffs are entitled to interest on 80% of the response costs incurred. This interest shall be

calculated in accordance with CERCLA at the Superfund rate from the date of the Complaint or the date of the expenditure, whichever occurred later. *42 U.S.C. § 9607(a)(4)(D).*

H. Plaintiffs' Claims Under the HSCA.

Carpenter's liability is neither greater nor lesser under the HSCA. As the Pennsylvania equivalent of CERCLA, many of the HSCA's provisions mirror those of the federal act. Indeed, the HSCA, like CERCLA § 113(f), authorizes private parties to seek contribution from other potentially responsible parties. *35 P.S. § 6020.702(a)(3).*

Liability is established under the HSCA by establishing: (1) there has been a release or threatened release; (2) of a hazardous substance; (3) from a site, and (4) there is a responsible person as stated in § 701(a). In the present case, Carpenter stipulated that there was a release or threatened release of a hazardous substance at Boarhead Farms. (J-33 P 6.) Additionally, Carpenter stipulated that Boarhead Farms is a 'site' as that term is defined in § 103 of the HSCA. (J-33 P 3.)

Plaintiffs were therefore required to direct their proofs toward establishing Carpenter's status as a responsible party under § 701(a). Carpenter is a responsible party under § 701(a) because it arranged with DCC by contract for the disposal of a hazardous substance. *35 P.S. § 6020.701(a)(2).* The HSCA definition of a hazardous substance encompasses the CERCLA definition of a hazardous substance. *35 P.S. § 6020.103.* Therefore, Carpenter's waste acids are hazardous substances as that term is defined in *35*

P.S. § 6020.103, for the same reasons the waste acids were hazardous substances under CERCLA. See Section III.D.1.a supra. Carpenter is therefore a liable party under the HSCA.

The HSCA lists factors to be considered in making an equitable allocation. *35 P.S. § 6020.705(b)*. These factors were considered by the Court in making an allocation under CERCLA § 113(f) and therefore do not change the analysis. Additionally, plaintiffs have already been awarded prejudgment interest on their *§ 107* and § 113(f) claims.

For all of these reasons, Carpenter's liability under the HSCA parallels its liability under CERCLA.

IV. Conclusion

And now, this 18th day of August 2008, it is ORDERED as follows:

> 1. Judgment is entered in favor or Cytec Industries, Inc., Ford Motor Company, SPS Technologies, LLC, TI Group Automotive Systems LLC, and Agere Systems, Inc. and against defendant Carpenter on Counts I, II, and V in the amount of $ 10,942,702.84.[45]
>
> 2. Plaintiffs are entitled to prejudgment interest on 80% of all costs incurred through January 1, 2008.

---

[45] The court notes that the 5th Amended Complaint omitted Count IV. Count IV is mislabled as Count V.

3. A declaratory judgment is entered in favor of Cytec Industries, Inc., Ford Motor Company, SPS Technologies, LLC, TI Group Automotive Systems LLC, and Agere Systems, Inc. and against defendant Carpenter on Count III. Carpenter is liable for 80% of all future costs, as measured from January 1, 2008, for response actions pursuant to the 2000 and 2001 Consent Decrees.

4. Judgment is entered in favor of Carpenter and against Cytec Industries, Inc., Ford Motor Company, SPS Technologies, LLC, TI Group Automotive Systems LLC, and Agere Systems, Inc. On Carpenter's claims for contribution. Plaintiffs are liable for 20% of all past and future response costs.

5. On or before Wednesday, August 20, 2008, Plaintiffs are ORDERED to submit an revised interest calculation in accordance with this Order.

BY THE COURT:

/s/ Legrome D. Davis
Legrome D. Davis, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1814

AGERE SYSTEMS, INC.;
CYTEC INDUSTRIES, INC.; FORD MOTOR COMPANY;
SPS TECHNOLOGIES, LLC; TI GROUP AUTOMOTIVE SYSTEMS, LLC
v.
ADVANCED ENVIRONMENTAL TECHNOLOGY CORPORATION;
ASHLAND, INC.; CARPENTER TECHNOLOGY CORPORATION;
DIAZ CHEMICAL CORPORATION; FCG INC;
HANDY & HARMAN TUBE CO, INC.; NRM INVESTMENT COMPANY
Carpenter Technology Corporation,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-3830)
District Judge: Honorable Legrome D. Davis

SUR PETITION FOR REHEARING
Present: SLOVITER, JORDAN, and GREENBERG,
Circuit Judges

The petition for panel rehearing filed by Appellees having been submitted to all judges who participated in the decision of this court, and a majority of the judges who concurred in the decision not having asked for rehearing, it is hereby ORDERED that the petition for panel rehearing is hereby DENIED.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: May 25, 2010
tyw/cc: All counsel of record

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1814

AGERE SYSTEMS, INC.;
CYTEC INDUSTRIES, INC.; FORD MOTOR COMPANY;
SPS TECHNOLOGIES, LLC; TI GROUP AUTOMOTIVE SYSTEMS, LLC
v.
ADVANCED ENVIRONMENTAL TECHNOLOGY CORPORATION;
ASHLAND, INC.; CARPENTER TECHNOLOGY CORPORATION;
DIAZ CHEMICAL CORPORATION; FCG INC;
HANDY & HARMAN TUBE CO, INC.; NRM INVESTMENT COMPANY
Carpenter Technology Corporation,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-3830)
District Judge: Honorable Legrome D. Davis

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*
Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL,
BARRY, AMBRO, SMITH, FISHER, CHAGARES, JORDAN, GREENAWAY, and GREENBERG*,
Circuit Judges

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*Judge Greenberg's vote is limited to panel rehearing only.88

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: May 25, 2010
tyw/cc: All counsel of record

APPENDIX E

RELEVANT STATUTORY PROVISIONS

Section 104 of CERCLA, 42 U.S.C. § 9604, provides in relevant part:

> (a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception
>
> (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may

> allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

Section 107 of CERCLA, 42 U.S.C. § 9607, provides in relevant part:

> (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> > (1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

* * * *

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

Section 113 of CERCLA, 42 U.S.C. § 9613, provides in relevant part:

> (f) Contribution
>
> (1) Contribution
>
> Any person may seek contribution from any other person who is liable or potentially liable under section 9607 (a) of this title, during or following any civil action under section 9606 of this title or under section 9607 (a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.
>
> (2) Settlement
>
> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such

> settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.
>
> (3) Persons not party to settlement
>
> * * * *
>
> (B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2). . . .

Section 122 of CERCLA, 42 U.S.C. 9622, provides in relevant part:

> (a) Authority to enter into agreements
>
> The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604 (b) of this title) if the President determines that such action will be done properly by such person. Whenever practicable and in the

public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

* * * *

(e) Special notice procedures

* * * *

(6) Inconsistent response action

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

28 U.S.C. § 2106 provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

173 (3)

SUPREME COURT, U.S.
FILED
OCT 27 2010
CLERK

No. 10-279

IN THE
Supreme Court of the United States

CARPENTER TECHNOLOGY CORPORATION,

Petitioners,

v.

AGERE SYSTEMS, INC., CYTEC INDUSTRIES, INC., FORD MOTOR COMPANY, SPS TECHNOLOGIES, LLC AND TI AUTOMOTIVE SYSTEMS LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions, properly presented, are:

1. Whether the Third Circuit erred in holding that when a party shoulders the costs of ongoing remediation work at a Superfund Site, and does so pursuant to a settlement agreement with other responsible parties, it "incurs" those costs and may therefore bring suit against other potentially responsible parties under § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9607(a)(4)(B), which authorizes a cause of action for recovery of the "costs of response incurred" by a private party, *id.*

2. Whether the Third Circuit abused its discretion in holding that, under the particular facts of this complex case, a remand was warranted to allow the district court to reconsider its equitable allocation of the cleanup costs among the responsible parties, reexamine the evidence already in the record, and reopen the record if appropriate.

RULE 29.6 STATEMENT

The parent corporation of respondent Agere Systems, Inc. is LSI Corporation, and the parent corporation of respondent SPS Technologies, LLC is Precision Castparts Corp. TI Group Automotive Systems, L.L.C. is wholly owned by respondent TI Automotive Systems LLC, which in turn is ultimately wholly owned by TI Automotive, Ltd., a private UK company. Neither respondent Cytec Industries Inc. nor respondent Ford Motor Company has any parent corporation.

No publicly held company owns 10% or more of the stock of any respondent.

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STATEMENT OF THE CASE

This complex CERCLA[1] case has been litigated for the last eight years and traces its origins to events occurring over three decades ago. And it has yet to be resolved: in the decision of which petitioner seeks this Court's review, the court of appeals remanded the case to the district court for further proceedings. The key facts are as follows.

1. Between 1972 and 1976, DeRewal Chemical Company, Inc. ("DCC") illegally dumped its customers' chemical waste in various sites in Pennsylvania. *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 7a & n.1. One of those sites, in Bucks County, Pennsylvania, came to be known as the Boarhead Farms Superfund Site ("the Boarhead Site" or "the Site"). *Id.* at 6a.

Beginning in the early 1980s, the Environmental Protection Agency ("EPA") opened an investigation into the contamination at the Boarhead Site. *Id.* at 8a-9a. The EPA ultimately expended more than $14 million on those investigations, and on excavating buried drums and contaminated soils, constructing and operating a groundwater extraction and treatment system, and other initial cleanup actions. *Id.* at 74a. In its 1998 Record of Decision ("ROD"), EPA selected the permanent remedial technologies necessary to address the contamination at the Site. *Id.* at 9a.

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[1] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Superfund Amendments and Reauthorization Act of 1986, codified at 42 U.S.C. §§ 9601-9675 (collectively "CERCLA").

2. a. Respondents Cytec Industries Inc. ("Cytec"), Ford Motor Company ("Ford"), and SPS Technologies, LLC ("SPS") are companies who had some of their waste hauled by DCC in the 1970s. *Id.* at 14a. Because DCC improperly disposed respondents' waste at the Site, respondents became potentially responsible parties ("PRPs") for cleanup costs under CERCLA, which imposes strict liability for environmental contamination upon "any person who ... arranged with a transporter for transport for disposal ... of hazardous substances owned or possessed by such person," *id.* at § 9607(a)(3); *see also* Pet. App. 146a-147a.

On June 2, 2000, EPA sued Cytec, Ford, and SPS, pursuant to § 107(a)(4)(A) of CERCLA, 42 U.S.C. § 9607(a)(4)(A), which authorizes the United States to recover against PRPs "all costs of removal or remedial action incurred by the United States Government." Pet. App. at 20a. Cytec, Ford, and SPS simultaneously entered into a consent decree with EPA, in which they agreed to take over the operation and maintenance of the groundwater remediation system and perform other remedial actions required by the ROD, collectively the Operable Unit 1 ("OU-1") work. *Id.* at 10a.

Although respondents TI Automotive Systems, L.L.C. ("TI") and Agere Systems, Inc. ("Agere") had not been sued by EPA, *id.* at 14a, they recognized that their waste might have been dumped at the Site. Accordingly, they agreed, along with two other companies, to perform the OU-1 work collectively with SPS, Ford, and Cytec, and entered into private agreements to that effect. *Id.*; *see also id.* at 76a.

The seven companies then together hired contractors to perform the specific remediation tasks and established trust accounts into which they contributed funds and from which the contractors were paid. *Id.* at 76a.

b. In 2001, SPS, Ford, Cytec, and TI entered into a second consent decree with EPA, in which they agreed to implement the remaining ROD remedy components (collectively the Operable Unit 2, or "OU-2," work), and to compensate EPA more than $7 million for costs EPA had already incurred cleaning up the Site. *Id.* at 11a. Agere, without being sued by EPA or any PRP, entered into an agreement with the other respondents in which it agreed to perform and fund OU-2 work collectively with the other respondents, again through the establishment of common trust accounts, joint retention of contractors to do the work, and payment of those contractors from the common accounts. *Id.*; *see also id.* at 76a-77a.

3. Petitioner Carpenter Technology Corporation ("Carpenter") was also a customer of DCC in the 1970s and is responsible for almost one million gallons of highly acidic waste that DCC illegally dumped at the Boarhead Site. *Id.* at 16a. Indeed, Carpenter engaged DCC to haul away its "potent waste acids" despite knowing that DCC had a history of unlawful polluting practices. *Id.* at 16a-17a; *see also id.* at 127a, 153a.

Unlike respondents, however, Carpenter has yet to accept its responsibility. *Id.* at 17a, 127a-128a. In 2000, Carpenter received a notice letter from EPA asking it to resolve its potential liability to EPA and to agree to perform remediation work at the Site. *Id.*

at 12a. "Carpenter, however, rejected the entreaty." *Id.* at 154a; *see also id.* at 13a. It made no effort to resolve EPA's claims and, to date, has not paid a single penny toward respondents' costs of remediating the Site (or the more than $7 million that respondents SPS, Ford, Cytec, and TI paid to settle EPA's cost claims). *Id.* at 17a.

4. On June 18, 2002, respondents timely commenced this action against petitioner Carpenter and several other defendants, pursuant to CERCLA, in order to recover each defendant's equitable share of respondents' costs. *Id.* at 6a.[2]

a. CERCLA provides two separate causes of action to "allow private parties to recover expenses associated with cleaning up contaminated sites." *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007). On the one hand, § 113(f) provides a right of contribution, but only for equitable distribution of costs and, crucially, only after a party has been sued by the government or another PRP. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). On the other hand, § 107(a)(4)(B) is available to private parties that have not been sued, and allows for joint-and-several liability, though it only allows parties to recover costs that they have themselves "incurred." *Atl. Research*, 551 U.S. at 137.[3]

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[2] Respondents also brought claims under a state-law statute that parallels CERCLA. *Id.* at 25a.

[3] As noted *supra*, § 107(a)(4)(A) grants the United States an identical cause of action to recover "all costs of removal or remedial action [it has] incurred ...." Section

Because Cytec, Ford, and SPS had previously been sued by EPA, and TI had been sued with respect to the OU-2 work, these respondents were able to bring reimbursement claims pursuant to § 113(f) of CERCLA (and TI was able to bring a § 113(f) claim with respect to the OU-2 work). And because their consent decree with EPA required them to incur cleanup costs on a going-forward basis, they also brought § 107(a) claims for cost recovery.

Agere had not been sued, however; it merely recognized that it might bear responsibility for cleanup costs at the Boarhead Site and therefore voluntarily came forward and agreed to shoulder the costs of remedial work on a going-forward basis. Pet. App. 76a. Similarly, TI had not been sued for the OU-1 work. *Id.* at 76a-77a. Lacking a § 113(f) claim, Agere instead brought only § 107(a) claims. And TI brought a § 107(a) claim limited to the costs of the OU-1 work.

In response to respondents' § 107(a) claims for joint-and-several liability, Carpenter counterclaimed under § 113(f) to seek an equitable distribution of costs among the PRPs. *See Atl. Research*, 551 U.S. at 140 (noting "a defendant PRP in ... a § 107(a) suit

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107(a)(4)(A) limits recoverable costs to those "not inconsistent with the national contingency plan." Similarly, § 107(a)(4)(B) limits recoverable costs to those "consistent with" the plan. In this case, the parties stipulated that "[t]he costs incurred by the OU-1 and OU-2 Groups were necessary to comply with the requirements of the ROD and were consistent with the National Contingency Plan." Pet. App. 133a.

could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim").

Carpenter also argued that none of the respondents could maintain § 107(a) claims. Carpenter pointed to language in *Atlantic Research* stating that "a PRP that pays money to satisfy a settlement agreement or a court judgment," but does not "itself incur[] clean-up costs," has a § 113(f) claim for contribution but not a § 107(a) claim for cost recovery. 551 U.S. at 139. According to Carpenter, this language in *Atlantic Research* precludes a party that shoulders the costs of cleanup pursuant to a consent decree with EPA or a voluntary settlement with other PRPs from ever asserting a § 107(a) claim.

b. When the bench trial began on June 23, 2008, all of the defendants had settled or had been granted unopposed motions to dismiss or unopposed motions for summary judgment—with the exception of Carpenter and Handy & Harman Tube Company, Inc. ("H&H"). Pet. App. 13a-14a & n.16.[4] These remaining parties stipulated to many, but not all, of the relevant facts. *Id.* at 132a-133a.

In light of Carpenter's § 113(f) contribution counterclaim, a key purpose of the bench trial was to determine how much of each party's waste was hauled by DCC to the Boarhead Site. The district court considered this and other evidence (including Carpenter's actual knowledge of DCC's history of pollution and Carpenter's refusal to cooperate with EPA) in order to "allocate response costs among liable parties

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[4] H&H was granted an unopposed motion to dismiss after trial. *Id.* at 14a.

using such equitable factors as the court determine[d] [were] appropriate," as required by CERCLA's contribution provision. 42 U.S.C. § 9613(f)(1); *see* Pet. App. 168a.

On the first day of trial, respondents entered into a stipulation (the "June 23 stipulation") with defendant H&H "as to the nature and volume of H&H waste disposed of at the Site and the volumes of waste[] of [respondents] that were hauled by DCC." *Id.* at 50a. Although Carpenter did not sign the June 23 stipulation, it did sign a July 1, 2008 stipulation with the respondents and H&H, which referenced the June 23 stipulation. Respondents took the position that by executing the July 1st stipulation, Carpenter had also joined the first one as well. *Id.* at 50a-51a. In any event, record evidence independently corroborated the volume amounts listed in the June 23 stipulation; for instance, respondents listed respective levels of waste in answers to pretrial interrogatories, and Carpenter itself introduced these answers into evidence. *Id.* at 56a. Respondents had also submitted into evidence exhibits—including invoices and purchase orders—that further corroborated the waste levels of various parties. *Id.* at 51a & n.35.

Following the bench trial, the district court ruled in respondents' favor on all claims. As an initial matter, the district court rejected Carpenter's argument that *Atlantic Research* precludes a party from bringing a § 107(a) claim to recover costs that it incurs pursuant to a settlement agreement. It noted that this Court "specifically left undecided" the question "whether costs of response which are compelled,

but not reimbursement, are recoverable under § 113(f) or § 107(a), or both." *Id.* at 135a. And it concluded that respondents Cytec, Ford, and SPS (and TI limited to the OU-2 work) could bring both § 107(a) and § 113(f) claims, while Agere and TI could bring § 107(a) claims. *Id.* at 134a-137a.

The court determined that, in light of Carpenter's proportionate responsibility for the waste at the Site, actual knowledge of DCC's polluting practices, and failure to cooperate with EPA, Carpenter's equitable share of the costs of cleanup (and reimbursement of EPA's costs) should be set at 80%. *Id.* at 150a-155a. One predicate of this holding was the district court's finding that Carpenter's volumetric share was 62.60% of the total waste; although other record evidence was available, *see* p. 7, *supra*, the court's opinion cited only the June 23 stipulation as the basis for this finding. *Id.* at 51a.

5. In a unanimous opinion, the Third Circuit vacated the district court's judgment and remanded for further proceedings. *Id.* at 7a.

a. The court first held that Agere and TI could bring § 107(a) cost recovery claims for sums paid pursuant to private settlement agreements with the other respondents. Section 107(a) authorizes a private party to recover costs it has "incurred," and the court reasoned that Agere and TI incurred cleanup costs "in the ordinary sense that a bill one obligates oneself to pay comes due as a job gets done." *Id.* at 38a-39. Moreover, the court noted that *Atlantic Research*'s discussion of settlement agreements "w[as] not made in the context of payments made for ongoing work." *Id.* at 39a.

The court also noted the anomalous consequences of Carpenter's position: Carpenter maintains that Agere and TI have no § 107(a) claims, and yet "Agere and TI do not have § 113(f) contribution claims for the settlement sums because those parties were never themselves sued for those amounts by the EPA or by other PRPs." *Id.* Thus, under Carpenter's theory, Agere and TI "would be completely barred from recovering ... under CERCLA." *Id.*

"To accept that outcome," the court added, "one must imagine that Congress intended to penalize cooperative cleanup efforts by excluding from CERCLA's broad recovery provisions all PRPs who, like Agere and TI, agree to come forward and assist in a cleanup even though they have not been subjected to a cost recovery suit." But "[s]uch an intent is extremely unlikely, since the goal of CERCLA is 'to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.'" *Id.* at 40a-41a (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994)).

Indeed, the court explained, "[w]hen a company in the position of Agere and TI has not yet been sued by the EPA but appreciates that it bears some responsibility for cleaning up hazardous waste, the language of CERCLA, which is intended to encourage cleanup, ought not to be interpreted to discourage participation in cleanup if a more consistent construction of the statute is plausible." *Id.* at 40a. That is because "[p]rivate actors are not likely to settle and step forward unless they know that they can seek some of the amounts they will contribute, just

like ... those who have been sued by the EPA or a PRP, or those who voluntarily clean up a site in the first instance." *Id.*

At the same time, the court held that in the circumstances of this case, respondents Cytec, Ford, and SPS (and TI with respect to the OU-2 work) should not be allowed to bring § 107(a) claims alongside their § 113(f) claims. The court did not dispute that these respondents "incurred" costs. It precluded their § 107(a) claims on the theory that a party should not be allowed to pursue both causes of action, and because these particular § 107(a) claims would not have been subject to Carpenter's counterclaim for equitable distribution. *See id.* at 45a (noting that § 113(f)(2), 42 U.S.C. § 9613(f)(2), precludes "claims for contribution" against PRPs that settle with EPA).

b. Together these holdings ensured that each of the respondents could seek compensation or reimbursement. But the Third Circuit then held that the district court abused its discretion in resolving those claims and in establishing an equitable distribution of costs. It reasoned that the district court should not have relied on the June 23 stipulation to determine Carpenter's volumetric share of the total waste, because Carpenter could not be treated as having joined it. *Id.* at 52a. And because the district court's opinion "appear[ed]" to rely exclusively on the June 23 stipulation as the basis for that finding, *id.* at 51a, its volume allocation "constitutes an abuse of discretion and cannot stand," *id.* at 56a.

The court of appeals acknowledged, however, that "[w]hile the stipulations are inadmissible ..., there

may well be other evidence of record that could be dispositive as to [respondents'] and H&H's waste volumes." *Id.* at 56a. It therefore remanded to the district court, "which is far more familiar" with that potential evidence. *Id.* at 57a. And it observed that the district court "may also decide that, in the unusual circumstances of this case, the record will need to be reopened to consider the equitable allocation again, and, in that context, it may review any admissible evidence as to the [respondents'] and H&H's waste volumes." *Id.*

6. Carpenter filed a petition for rehearing, arguing only that the Third Circuit erred in remanding the case because respondents failed to "meet their burden of proof." Pet. for Reh'g En Banc, 2010 U.S. 3rd Cir. Briefs LEXIS 1, *1-*3 (Apr. 26, 2010). It did not argue that the panel's decision was inconsistent with *Atlantic Research*. The Third Circuit denied rehearing, with no judge dissenting from the denial.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT'S DECISION ALLOWING AGERE AND TI TO MAINTAIN COST RECOVERY CLAIMS DOES NOT WARRANT REVIEW

In its 57-page opinion, the Third Circuit held that Agere and TI were entitled to pursue § 107(a) cost recovery claims. This holding adheres to CERCLA's plain text and statutory purposes, is consistent with this Court's precedents, is not in conflict with any other lower court decision, and is presented to this Court in an interlocutory posture. This Court's review is unwarranted.

1. The petition fails to identify any conflict between the Third Circuit's decision and the decision of any other court of appeals. In fact, the petition fails to cite any other lower court opinion that so much as considers the issue presented here. Given the lack of a circuit split—and the lack of a developed body of lower court decisions to inform this Court's review—further percolation in the lower courts is advisable.

That is especially so here, because the petition is interlocutory: the Third Circuit vacated the district court's judgment in favor of respondents and remanded for further proceedings. And where a "Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

2. a. In any event, the petition should be denied because the Third Circuit's holding is correct. Agere and TI have shouldered a portion of the costs of ongoing remediation work at the Boarhead Site, and thus have "incurred" costs in any ordinary sense of the word. *See* Pet. App. 38a-39a. Because § 107(a) authorizes a party to bring suit to recover "incurred" costs, CERCLA's text supports Agere's and TI's pursuit of § 107(a) claims. And the fact that respondents incurred these costs pursuant to a private settlement agreement does not alter the fact that they are "incurring" costs. *Accord W.R. Grace & Co.-*

Conn. v. Zotos, Int'l, Inc., 559 F.3d 85, 90-91 (2d Cir. 2009) ("Under the plain language of the statute, the fact that a party enters into a consent order before beginning remediation is of no legal significance with respect to whether or not the party has incurred response costs as required under section 107(a)").

b. Carpenter maintains, however, that this Court's decision in *Atlantic Research* carved an exception to the ordinary meaning of the word "incurred" for any costs borne as a consequence of a consent decree or settlement agreement. According to Carpenter, *Atlantic Research* "defined what the term 'incurred' means for purposes of § 107(a), drawing a clear distinction between costs of performance, on the one hand, and amounts paid in settlement, on the other." Pet. 8.

There are two obvious flaws in Carpenter's argument. First, Carpenter's categorical distinction between "costs of performance" and "amounts paid in settlement" finds scant support in *Atlantic Research*. Carpenter relies on the Court's statement that when "a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response," but rather "reimburses other parties for costs that those parties incurred." 551 U.S. at 139. But in the very next paragraph of the opinion, the Court clarified what it meant: a party who merely "reimburs[es] response costs paid by other parties" would not have "incurred its own costs of response and therefore cannot recover under § 107(a)." *Id.* That is, the Court merely recognized that *if* a party does not incur its own costs, but simply pays another

party to satisfy a settlement agreement by which it reimburses that other party's costs, *then* § 107(a) would be unavailable.

The court, however, did not suggest that a party by nature could never incur costs pursuant to a settlement agreement. To the contrary, the Court explicitly recognized that there might be situations in which "a PRP does not incur costs voluntarily but does not reimburse the costs of another party." 551 U.S. at 139 n.6.[5] And the court declined to "decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both." *Id.*[6]

Second, Carpenter's strained interpretation of *Atlantic Research* would undermine CERCLA's statutory purposes and produce anomalous results. As the court of appeals explained, if "Agere and TI cannot pursue § 107(a) claims for their settlement payments, they would be completely barred from recovering those amounts under CERCLA," because neither has been sued by EPA or another PRP, precluding recovery under § 113(f). Pet. App. 39a. Carpen-

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[5] For instance, when parties in a PRP group are collecting funds in advance to pay projected costs, the PRPs are paying for costs that have not yet been incurred. These payments cannot be reimbursements because the parties have yet to incur costs that could be reimbursed.

[6] Furthermore, Carpenter's reliance on *Atlantic Research* fails not only legally but also factually. Agere and TI entered into *agreements* with the other respondents. *See* Pet. App. 76a-77a. But no district court finding or evidence in the record supports the assertion that Agere and TI entered into *settlement* agreements. They did not settle any lawsuit—they had not been sued. *See id.* at 39.

ter's interpretation thus would "penalize cooperative cleanup efforts by excluding from CERCLA's broad recovery provisions all PRPs who, like Agere and TI, agree to come forward and assist in a cleanup even though they have not been subjected to a cost recovery suit." *Id.* at 39a-40a.

To be sure, Carpenter insists its position would not leave PRPs like Agere and TI without a remedy. Pet. 11. But what it proposes is far from reassuring. Carpenter speculates that Agere and TI could simply "settle with EPA," *id.*, though it nowhere explains how private parties could completely control EPA's litigation decisions. Carpenter next suggests that if a PRP does not get sued by EPA (and therefore has no opportunity to settle), it should simply refrain from offering any cleanup assistance, and instead should offer no more than its proportionate share to the PRPs that have settled with EPA. But CERCLA's purposes would be stifled by Carpenter's envisioned regime—in which a PRP would be pressed to offer *less* cleanup assistance than it is inclined to do.

Carpenter also argues that its interpretation of the word "incurred" would promote CERCLA's statutory purposes in other ways. Carpenter suggests that if PRPs like Agere and TI—who have voluntarily accepted their responsibility for cleanup costs—are allowed to pursue § 107(a) claims, they will have less incentive to settle with EPA. *Id.* at 12. Carpenter is poorly positioned to make that argument in light of its steadfast refusal to cooperate with EPA. Carpenter, in any event, is wrong: nothing in the court of appeals' holding would discourage Agere and TI from settling with EPA if they were ever sued.

c. Finally, § 122(e)(6) of CERCLA, 42 U.S.C. § 9622(e)(6), offers no support to Carpenter's petition. Carpenter interprets § 122(e)(6) as providing that only parties to an EPA consent decree have the "right or ability to perform the cleanup under CERCLA." Pet. 10-11. Because Agere and TI are not parties to an EPA consent decree, Carpenter argues, they cannot properly "incur" cleanup costs at the Site.

Carpenter misreads the provision. Section 122(e)(6) provides that "no potentially responsible party may undertake any remedial action" unless "such remedial action has been authorized by the President," but it *does not* say that the President, having authorized remedial actions, must also specify particular parties authorized to perform the remedial actions. Unsurprisingly, Carpenter identifies no support for its contrary argument.

For all of those reasons, review of the CERCLA § 107(a) question should be denied.

II. THE THIRD CIRCUIT'S REMAND FOR FURTHER PROCEEDINGS DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner asserts that the Third Circuit's remand violated "well-established principles of appellate procedure," namely, that "a plaintiff is not entitled to a remand to reopen the record following an appellate court's determination that the plaintiff failed to satisfy its burden of proof at trial, unless some 'special circumstance' exists that would make entry of judgment for the defendant unfair." Pet. 18-19. That factbound claim does not warrant review.

1. As an initial matter, Carpenter inaccurately frames the issue. According to Carpenter, the court of appeals conclusively found that respondents failed to offer any admissible evidence on the volume allocation issue. But the court of appeals found no such thing. While it found that the district court relied exclusively upon inadmissible evidence *in its opinion*, it did not find that there was no admissible evidence on volume allocation issues *in the record*, or even that respondents failed to offer any probative evidence in their case-in-chief. To the contrary, the court expressly reserved those questions for the district court to consider on remand. *See* Pet App. 56a ("While the stipulations are inadmissible unless a hearsay exception applies, there may well be other evidence of record that could be dispositive as to [respondents'] and H&H's waste volumes."). Indeed, a key reason for the court of appeals' remand was that the district court would be in a better position to sift through the factual evidence to make that assessment. *Id.* at 57a.

2. Even if the petition's framing of the question were accurate, it would not warrant this Court's review.

To begin with, Carpenter's argument misstates the legal standard. Although Carpenter argues that the Third Circuit's remand would be permissible only upon a finding of "some 'special circumstance,'" Pet. 19, it offers no citation for that phrase, and it is in fact well-settled that courts of appeals have broad discretion to decide that a remand is appropriate, even after concluding that a plaintiff's evidence is insufficient. *See Weisgram v. Marley Co.*, 528 U.S.

440, 454, 456 (2000) (courts of appeals should exercise "informed discretion" in deciding whether to direct entry of judgment or instead "return[] the case to the District Court for further proceedings").[7] Moreover, it is plainly appropriate to allow a district court on remand to reopen the record. *Cf. Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 551 (1983) ("On remand, the decision on whether to reopen the record should be left to the sound discretion of the trial court.").

In any event, Carpenter's argument fails on its own terms. Even if a court of appeals were always required to identify some "special circumstance" before remanding for further proceedings, the Third Circuit's remand would still be appropriate because the court expressly found that this case posed "unusual circumstances." Pet. App. 57a. To be sure, Carpenter takes issue with that determination, *see, e.g.*, Pet. 22-23, but its factbound disagreement with the court of appeals' conclusion does not merit review.

The factbound nature of the petition is underscored by the fact that Carpenter does not, and cannot, assert that the court of appeals' remand implicates any conflict in the lower courts. Although Carpenter cites cases in which a remand was not granted (including a Third Circuit precedent), *see* Pet. 20-25, those outcomes merely reflect the exer-

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[7] *See also* 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction ... may remand the cause and ... require such further proceedings to be had as may be just under the circumstances.").

cise of discretion in the particular circumstances of those cases.

Review is even less warranted in this case, because the proceedings on remand may well obviate the need to reopen the record. For instance, the district court could conclude that the evidence already in the record suffices to reaffirm its earlier factual findings and equitable distribution of costs (an outcome the Third Circuit strongly indicated would be appropriate, *see* Pet. App. 56a-57a).[8]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[8] Petitioner argues that respondents "waived" the option of a remand. Pet. 25-30. The court's option to remand in its discretion is not "waivable" by a party, and any factbound question concerning waiver in any event would not warrant review.